United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/938
19 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 938

Case No. 1024: OUSTINOVITCH

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor Yenyi Olungu;

Whereas, on 19 June 1998, Vitali Borissovitch Oustinovitch, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application, the pleas of which read as follows:

"...

The Appellant hereby wishes **first** to appeal against the decision of the Secretary General of ICAO not to follow the conclusions 8.4 and 8.5 ... of the Advisory Joint Appeals Board's (AJAB) Opinion No. 113 (...), namely to pay for the termination indemnity.

Second the Appellant appeals against the action of the Secretary General of ICAO for not continuing to search for an acceptable alternative employment. The Appellant asks for a minimum of two years salary as compensation for the missed opportunity of salary revenue.

Third the Appellant asks for $35,000.- in moral damages.

Fourth the Appellant asks that the ICAO's Administration shows documented [proof] of their seriousness to follow up conclusion 8.2 of the AJAB opinion."

Whereas the Respondent filed his answer on 15 October 1998;

Whereas, on 17 June 1999, the Applicant filed an additional document and on 12 July 1999 the Respondent commented thereon;

Whereas, on 2 August 1999, the Tribunal decided to defer consideration of the case to its autumn session;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 27 April 1987, on a fixed-term contract of employment for a period of three years, at the P-3 level, as a Technical Officer, Communications, in the European and North Atlantic Office, Paris. The contract provided that "the appointment carries no expectancy of renewal upon expiry, and will terminate on its expiry date without further notice".

In a letter dated 11 December 1989, the Applicant was offered a new fixed-term contract from 27 April 1990 for a period of two years. This contract likewise contained a clause stating that the appointment carried no expectancy of renewal and would terminate on expiry without further notice; the Applicant accepted this offer on 21 December 1989.

On 3 May 1991, the Personnel Branch sent to the ICAO Representative (ICAO REP), Paris Office, Form 176 by which he was asked to indicate whether the Applicant's contract should be renewed and if so, whether this should be on a career (term appointment) or non-career basis. The ICAO REP, Paris, recommended a contract renewal but on a non-career basis; the Secretary General, ICAO, agreed with this recommendation on 12 August 1991.

The Applicant's contract of employment was further renewed by letter dated 18 March 1992 for a period of two years on a fixed-term basis from 27 April 1992. This letter also stated that the appointment carried no expectancy of renewal and would terminate on expiry without further notice. The Applicant signed this new contract on 15 April 1992.

On 4 October 1993, the ICAO REP, Paris, recommended the abolition of the post encumbered by the Applicant. The Secretary General, ICAO, approved this recommendation on 18 October 1993.

By memorandum dated 9 November 1993 to the Applicant, the Chief, Personnel Branch (C/PER), informed the Applicant as follows:

> "I must confirm the verbal information you received from ICAO REP, Paris, several months ago, that due to a reorganization in the EUR/NAT Office, the Secretary General has decided to abolish your post, PN 2920.004RP, upon the expiry of your present fixed-term appointment, i.e. as of 27 April 1994. After a thorough review of vacant posts in the Organization no suitable post commensurate with your qualifications and experience is available within ICAO so that the Secretary General will not be able to offer you acceptable alternative employment. It will therefore not be possible to offer you a renewal of your fixed-term appointment after its expiry on 26 April 1994."

In a memorandum dated 19 November 1993 to the C/PER, the Applicant drew attention to a number of personal factors, including the fact his son was a third-year student at the Sorbonne University and his school year and exams would "terminate in June with the licence diploma delivered in July 1994". He continued:

> "Taking all the above into account, as well as the requirement for continuation of the COM section activities during the 1994 summer vacation period and preparation for the Special EUR RAN Meeting (September 1994) I would like to ask you to postpone the abolishment of the post and to renew my contract for a reasonable period of time."

The C/PER replied on 17 December 1993, informing the Applicant that after a "careful review of your personal circumstances, particularly the fact that your son ... will obtain a 'Licence' degree in July 1994 and the need for the Organization to abolish your post as of 27 April 1994 upon expiry of your present fixed-term appointment, the Secretary General has decided to postpone the abolishment of your ... post by three months. Consequently, your present fixed-term appointment will be extended until 27 July 1994." The Applicant's contract of employment was accordingly extended with the remaining terms and conditions of the 18 March 1992 contract unchanged. The Applicant unconditionally accepted this extension on 14 February 1994.

On 22 June 1994, the Applicant wrote to the C/PER, as follows:

> "Having carefully read your memo[randum] of 9 November 1993 on the subject of the abolishment of the post PN 2920.004RP proposed by the Paris Office ICAO REP, ..., in June 1993, I am under the impression that a year [has] passed and a lot of important developments occurred regarding the volume of work in the COM Section in the ICAO Paris Office. I have some strong indications confirming that the argument raised by [the ICAO REP], regarding the insufficient amount of work in the COM Section, to support the abolishment of the post, was wrong.
>
> ...
>
> On the basis of the above, I fail to understand why my contract could not be renewed.
>
> Your early attention to this matter and your favourable decision would be highly appreciated."

The Acting C/PER replied on 23 June 1994, requesting the Applicant to note that the offer of extension signed by him on 15 April 1992 stated that the appointment carried no expectancy of renewal upon expiry. He further informed that a restructuring of the work of the Paris Office was found necessary "because a professional level post had to be returned to Cairo."

On 7 July 1994, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). The Board adopted its report on 19 March 1998. Its findings and conclusions read, in part, as follows:

> "7. **FINDINGS OF THE BOARD**
>
> ...
>
> 7.2 The Board noted the Secretary General's view, as expressed by his Representative, that the appeal was not receivable insofar as the Appellant did not respect the applicable time limits specified in the Staff Rules. The Board finds that the time limit, as expressed by the Secretary General, was based on the date of the original notification of the decision to abolish his post, 9 November 1993; whereas

the Board bases the applicability of the time limits specified in the Staff Rules to the date of the notification by A/C/PER [Acting Chief, Personnel Branch] on 24 June 1994 stating that the Appellant's appointment was abolished and could not be further extended. The Board finds that the Appellant had spent the time between the original notification and the letter from A/C/PER (between 9 November 1993 and 24 June 1994) seeking means to resolve his situation in accordance with staff rule 111.1.1, and that he submitted his intention to appeal only after having exhausted all other means at his disposal. Since the letter of intention to appeal was submitted within the specified time limits after the letter of 24 June 1994 from A/C/PER which effectively brought the informal review action to a close, the Board finds that the appeal was receivable.

...

8. CONCLUSIONS

8.1 The Board recognizes that the decision of the Secretary General to abolish a post is a discretionary one and that the Board cannot judge on the desirability or necessity of such action. Therefore, the Board cannot comment [on] the claim of the Appellant [relating to this issue] and must reject the said claim.

8.2 ... the Board finds that there is no documented evidence that an endeavour was made to find acceptable alternative employment for the Appellant, and that there is no evidence on file, nor produced at the Hearing, which would indicate that the Appellant is unsuitable to serve in the Organization. The Board accepts the claim of the Appellant ... and unanimously recommends, therefore, that the Personnel Branch be instructed to make another (documented) endeavour to find acceptable employment for the Appellant and that, if no such employment is currently available, the Appellant's name be placed on a roster for future consideration should suitable vacancies occur.

8.3 The Board is not in a position to judge whether the Appellant was a suitable candidate for any of the positions which may have been open at the time of the abolition of his post. Therefore, the Board must reject the said claim of the Appellant [relating to this issue] ...

8.4 The Board finds that, had the Appellant been accorded normal consideration vis-à-vis the awarding of a term appointment after the first two-year fixed-term appointment, the Appellant would have been eligible for termination indemnity. The fact that the Appellant was not accorded normal consideration is viewed by the Board as a failure of Personnel procedures and, therefore, it is the unanimous

recommendation of the Board that, without creating a precedent, the Appellant be awarded the termination indemnity to which he would, under normal circumstances, have been entitled, the amount to be calculated in accordance with annex V of article IX of the ICAO Service Code.

8.5 ... the only loss that the Appellant can legitimately claim is the use of the termination indemnity to which he would have been entitled had normal Personnel procedures been followed. Therefore, the Board unanimously recommends that the Appellant be awarded the interest which would have accrued on the total sum of the termination indemnity during the excessive delay of eleven months, [for administrative delays in connection with the appeal], plus any additional delay which might occur after the submission of these findings. All other claims are rejected."

On 9 April 1998, the Secretary General informed the Applicant as follows:

"...

I accept the conclusions of the Board as set out in subparagraphs 8.1, 8.2 and 8.3 of its Opinion No. 113. However, I am unable to accept the Board's conclusions as contained in subparagraphs 8.4 and 8.5 of its Opinion."

On 19 June 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant should receive a termination indemnity under staff regulation 9.9 of the ICAO Service Code, as his separation from service was due to abolition of post.

2. The Secretary General failed to find the Applicant acceptable alternative employment in accordance with staff regulation 9.4 of the ICAO Service Code.

3. The Applicant should receive moral damages for the long delays during his appeal to the AJAB (in the amount of $35,000).

Whereas the Respondent's principal contentions are:

1. The Application is not receivable as it was time-barred under the AJAB procedure (staff rule 111.1)

2. Alternatively, the non-renewal of the Applicant's contract was a lawful and proper exercise of the powers of the Respondent.

3. Termination indemnity is not payable in the case of a non-renewal of a fixed term contract.

The Tribunal, having deliberated from 4 to 19 November 1999, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 9 April 1998. That decision did not accept the AJAB recommendation in its entirety. The Respondent did not accept the AJAB's findings that there had been a failure of procedures vis-a-vis the awarding of a term appointment to the Applicant and that termination indemnity should be paid. The Applicant claims that in its decision not to renew his fixed-term appointment, the Respondent used the procedure of abolition of post and not a termination of contract. Therefore, the Applicant is claiming a termination indemnity. In addition, the Applicant claims that the non-renewal of his fixed-term appointment violated his rights and requests the Tribunal to compensate him for damages due to the mishandling of his case by the ICAO.

II. At the outset, the Tribunal must turn to the Respondent's claim that the appeal before it is time-barred. Under ICAO staff rule 111.1, a staff member who wishes to appeal a decision of the Secretary General must first address a letter to the Secretary General requesting that the decision be reviewed. Such a letter must be sent within one month of the time the staff member received notification of the decision in writing (ICAO staff rule 111.1.5). If the staff member wishes to appeal against the answer from the Secretary General,

he shall appeal in writing within two weeks of the date of receipt of the answer; if no reply is received from the Secretary General within two weeks of the date the letter was received by him, the appeal shall be submitted within the two following weeks (ICAO staff rule 111.1.6). A staff member who fails to observe these time limits loses the right to appeal, unless the delay is waived (ICAO staff rule 111.1.8).

III. On 9 November 1993, the C/PER informed the Applicant that since his post was being abolished his fixed-term contract would not be renewed and that his employment at ICAO would be terminated in April 1994. Following a memorandum by the Applicant to the C/PER in which he requested a postponement of the abolition of his post because his son was to finish university in Paris and receive a "Licence" in July, the C/PER granted him a postponement of three months. On 22 June 1994, the Applicant wrote to the C/PER asking for a reconsideration of the abolition of his post. Once this was denied on 23 June 1994, the Applicant submitted a letter of appeal dated 7 July 1994 to the AJAB.

IV. Reviewing these facts, the Tribunal considers that the Applicant was informed of the termination of his contract on 9 November 1993. In the Applicant's memorandum dated 19 November 1993, he was not contesting the Respondent's decision but rather was asking for a postponement due to personal reasons. The granting of this postponement based on purely humanitarian grounds, did not constitute a waiver of the time-limits envisaged in ICAO staff rule 111.1. Nor can such an extension be explicitly or implicitly understood from the Respondent's memorandum to the Applicant dated 23 June 1994. This response was not a new decision, but simply a reiteration of the Respondent's previous decision to terminate the Applicant's contract. (Cf. Judgement No. 552, *Szenttornyay* (1992)). The Tribunal has consistently, in its decisions, emphasized the importance of complying with the mandatory time-limits. (Cf. Judgements No. 527, *Han* (1991); No. 549, *Renninger* (1992); and No. 596, *Douville* (1993)).

V. Consequently, the Applicant's application is not receivable since it is time-barred under ICAO staff rule 111.1.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/939
19 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 939

Case No. 1033: SHAHROUR

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Chittharanjan Felix Amerasinghe; Mr. Kevin Haugh;

Whereas at the request of Ghassan Mohammed Shahrour, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, successively extended until 30 November 1997, 28 February and 31 October 1998 the time-limit for the filing of an application to the Tribunal;

Whereas, on 23 July 1998, the Applicant filed an application requesting the Tribunal to order:

"i. Rescission of the contested decision of termination.

ii. Considering period of cessation as special leave with full pay, and payment of respective salaries and indemnities in US dollars at the exchange rate prevailing at the date of termination.

iii. Payment of compensation for the moral and material injury, including premeditated delay in process, Applicant sustained, to comprise salaries during cessation and until the time of judgement, should Respondent elect not to reinstate the Applicant.

iv. Payment of legal counseling and secretarial fees estimated at US$ 1,500."

Whereas the Respondent filed his answer on 31 January 1999;

Whereas the Applicant filed written observations on 27 March 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 2 July 1990 on a temporary indefinite appointment as an Area staff member in the capacity of Disability Programme Officer, in the Relief and Social Services Office, UNRWA, Syrian Arab Republic (SAR). As a condition of this appointment, the Director of UNRWA Affairs, SAR, had stipulated that the Applicant would be required to give up his private clinic for the complete duration of his employment with UNRWA. The Applicant had accepted this condition in writing on 11 June 1990.

On 17 February 1991, the Acting Field Administration Officer issued Field Staff Circular No. 1/91, informing all Area staff members, in particular medical officers and dentists, of the conditions under which they may engage in outside employment, including self-employment. The first of these conditions was that the prior approval of the Field Director must be obtained. Those staff members already engaged in outside employment were required by the Staff Circular to request the permission of the Field Director to continue.

On 9 October 1994, the Director of UNRWA Affairs convened a Board of Inquiry (BOI) to investigate several allegations of improper conduct on the part of the Applicant, as follows:

(a) That he had been involved in receiving from a non-governmental organization (NGO), money that might have been donated for the benefit of the Agency;

(b) That he had made statements to the press possibly in violation of Area Staff Regulations and Rules; and

(c) That he still continued his medical practice in violation of his written statement to the contrary.

On 12 November 1994, the BOI submitted its report to the Director of UNRWA Affairs. In the report it concluded that it was "satisfied that its investigation ... was fair and objective and that the testimony of the Applicant [before the BOI] invite[d] a reasonable inference that his conduct in all parts of the case demonstrate[d] a clear and convincing course of confusion, obfuscation and dereliction as a staff member of the United Nations." It further concluded that "[the Applicant was] guilty of issues two [making statements to the press possibly in violation of staff rules] and three [continuing his medical practice despite his written statement to the contrary] and with respect to the NGO, whilst his conduct caused no direct financial loss to UNRWA, it was a direct violation of staff regulations 1.2, 1.3, 1.4, and 1.5".

In a letter dated 23 November 1994, the Director of UNRWA Affairs advised the Applicant that, in view of the findings of the BOI, his "conduct was incompatible with the status of an UNRWA staff member, and [that he had therefore] decided to terminate [the Applicant's] appointment in the interest of the Agency under staff regulation No. 9.1 and Area staff rule No. 109.1, effective close of business on 24 November 1994."

On 19 December 1994, the Applicant wrote to the Director of UNRWA Affairs, requesting a review of the decision to terminate his appointment.

On 4 January 1995, the Applicant again wrote to the Director of UNRWA Affairs, bringing forward what he claimed was new information that he said he had received.

On 8 January 1995, the Director of UNRWA Affairs replied to the Applicant's letter of 19 December 1994, informing him that, having reviewed the report of the BOI, the

Applicant's personnel file, and the decision taken in his case, he was unable to rescind the administrative decision to terminate the Applicant's appointment in the interest of the Agency.

On 23 January 1995, the Director of UNRWA Affairs again wrote a letter informing the Applicant that the information set forth in his letter of 4 January 1995 did not allow him to rescind the administrative decision taken in the Applicant's case, and that, therefore, the Agency's position contained in his letter of 8 January 1995 to the Applicant remained unchanged.

On 2 February 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board submitted its report on 14 April 1997. Its evaluation, judgement and recommendation read as follows:

"**III. EVALUATION AND JUDGEMENT**

17. In its deliberations, the Board examined all documents cited before it, including the Appellant's personal file, and came out with the following:

(a) By reference to the appeal, the Board noted the Appellant's contention that the termination of his appointment in the interest of the Agency was considered as arbitrary termination.

(b) By reference to the Administration's reply, the Board noted the Administration's contention that the decision to terminate the Appellant's services in the interest of the Agency was made in exercise of valid marginal [sic] discretion.

(c) By reference to the report of the Board of Inquiry submitted on 12 November 1994, the Board noted that the said report states "*that the testimony of the Appellant invites a reasonable inference that his conduct in all parts of the case demonstrates a clear and convincing cause of confusion, obfuscation ...*"

(d) The Board noted that based on the evidence submitted by the Board of Inquiry that the Appellant had breached his contract with the

Agency and violated the Agency Rules and Regulations (paragraph 1 of Area staff rule 101.4).

(e) The Board also believes that the Appellant had made statements to the press and accordingly violated Area staff regulation 1.4 and 1.5.

(f) The Board here notes that the Administration's decision was utterly based on the findings of the report of the Board of Inquiry dated 12 November 1995.

(g) In this context, the Board is of the opinion that the Administration has dealt within the framework of standing rules and regulations governing disciplinary measures and termination of staff members and, accordingly, the Board could not establish that the Administration's decision to terminate the Appellant's appointment was motivated by prejudice or any other extraneous factors.

IV. RECOMMENDATION

18. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Appellant may deem pertinent, the Board unanimously makes its recommendation to uphold the Administration's decision and that the case be dismissed."

On 29 April 1997, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... I have carefully reviewed the Board's report and noted its conclusions. The Board found that the administrative decision to terminate your appointment was based on the findings of the Board of Inquiry, which were in turn supported by evidence. In the absence of proof that the decision had been motivated by prejudice or any other extraneous factors, the Joint Appeals Board recommended that your appeal be dismissed.

I agree with the Board's conclusions and I have therefore accepted its recommendation. Your appeal is dismissed.

..."

On 23 July 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant never failed to advise his supervisors of his outside activities at all levels.

2. The fact that the Applicant maintained an outside private clinic did not adversely affect his performance or the integrity of the Agency. In addition, many other staff members engaged in outside activities with impunity.

3. The charge that the Applicant intentionally misled the public in a published interview was imaginary and was created to serve the purpose of terminating him.

4. The Applicant informed the women of the non-governmental organization from the very beginning that he was a staff member of UNRWA and he never demanded cash when donations were made to him.

Whereas the Respondent's principal contentions are:

1. The Applicant's conduct, with regard to the charges made, was incompatible with the status of a staff member of the Agency.

2. The Applicant did not prove by convincing evidence that the decision to terminate his services was procedurally defective or tainted by improper motive or abuse.

3. The Respondent acted properly in the exercise of his managerial discretion.

The Tribunal, having deliberated from 29 October to 19 November 1999, now pronounces the following judgement:

I. The Applicant's employment was terminated by UNRWA in the interest of the Agency, under Area staff regulation 9.1 and Area staff rule 109.1. Area staff regulation 9.1

states: "The Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency." On appeal to the JAB, the JAB found that the Administration had acted pursuant to the "rules and regulations governing disciplinary measures and termination of staff members" and that it could not be established that the Administration's decision was "motivated by prejudice or any other extraneous factors".

II. It emerges from the record that the decision to terminate the Applicant's employment was based on a finding of misconduct and was a disciplinary measure.

III. There can be no doubt that under Area staff regulation 9.1, the Administration exercises a discretionary power (cf. Judgement No. 117, *van der Valk*, para. II, (1998)). The fundamental question raised, however, is the nature of this discretion under Area staff regulation 9.1, or, indeed, any discretion to act in the interests of the Agency in terminating employment.

IV. The Tribunal has held in earlier cases that the discretion under a provision empowering an organization to act in its interests must not be abused. In Judgement No. 18, *Crawford* (1953), the earliest case in which such a provision was in issue, the Tribunal held that the Administration had acted unlawfully in dismissing a staff member in the interests of the United Nations because she had failed to answer questions before a US Senate Subcommittee and had been a member of the Communist Party. The Tribunal found that there had been an abuse of discretion. In *van der Valk*, the Tribunal found that the termination of the Applicant's services in the interests of UNRWA, on account of abolition of post, was in order, as there was no provision in the Staff Rules of UNRWA that would require that senior staff be preferred to others in the case of abolition of post. There was no abuse of discretion. In Judgement No. 682, *Dabit* (1994), the termination of employment in the

interest of UNRWA on the basis of unsatisfactory performance was found not to be an abuse of discretion.

V. The discretion of the Agency to terminate employment in its interest is not unlimited or unfettered. Its exercise is subject to review by the Tribunal and can be declared invalid because it has been abused. The abuse may arise not only from improper motive, prejudice or improper purpose but also from any substantive irregularity such as error of fact or *erreur d'appréciation* (mistaken conclusions), or procedural irregularity. In *van der Valk* and *Dabit*, for instance, there were in effect found to be no such irregularities.

VI. The Administration clearly cannot terminate a staff member's employment in the interest of the Agency without having reasons for doing so and without stating those reasons. If it did so it would be abusing its discretion. When the reason for termination is given, the exercise of the discretion becomes subject to review by application of the general principles of law pertinent to the particular grounds for termination. Thus, if the reason for the termination is unsatisfactory performance or abolition of post, the decision taken by the Administration would be tested by the application of the general principles of law relating to dismissal for unsatisfactory performance or abolition of post, respectively. In these cases the general principles would pertain to substantive and procedural irregularity and abuse of purpose or motive.

VII. The Tribunal has recently dealt with several cases where the applicants have been dismissed from service in the interest of the Agency. In most of these cases, the grounds stated were misconduct or serious misconduct (cf. Judgements No. 926, *Al Ansari* (1999), (gross negligence amounting to misconduct); No. 927, *Abdul Halim et al.* (1999) (serious misconduct); and No. 928, *Abdulhadi et al.* (1999), No. 929, *Zarra and Khalil* (1999) (misconduct)). The issues were generally whether misconduct or serious misconduct had

been proven. The Tribunal considered that the issues presented concerned disciplinary measures and applied the law relating to the imposition of disciplinary sanctions. In Judgement No. 927, the Applicant Husary's termination was for what was initially described as misconduct and later found to be a serious error of judgement with resulting loss of confidence on the part of the Respondent. The Tribunal decided that the termination of service for misconduct was improper because, in its opinion, there was no misconduct. The matter should have been viewed as a performance matter, appropriately dealt with by administrative action. In effect, there had been a *détournement de procédure* as a result of which the termination of service could not be upheld. The point being made is that in general termination in the interest of the Agency can be traced to a particular narrow ground which is identifiable, as stated earlier.

VIII. Where the grounds for the dismissal are patently misconduct, as in this case, and the Tribunal is confronted with a case of imposition of disciplinary measures, the general principles of law pertaining to disciplinary measures become applicable, together with any provisions of written law.

IX. In general, administrative decisions (as contrasted with obligations of the Administration arising from terms of appointment and conditions of employment) involve the exercise of a discretion, the abuse of such discretion being actionable before the Tribunal. Thus, the decision, for example, to terminate employment for unsatisfactory service is an exercise of discretionary power subject to review by the Tribunal. However, starting with Judgement No. 18, *Crawford* and No. 29, *Gordon* (1953), the Tribunal has treated decisions to impose disciplinary measures somewhat differently because, while they are similar in some respects to decisions such as those terminating employment for unsatisfactory service, they also involve the exercise of a quasi-judicial power to impose sanctions for offences rather than the exercise of pure executive discretion (see e.g., most recently, Judgement No. 890, *Augustine* (1998)).

X. The jurisprudence of the Tribunal in disciplinary cases may be generally explained as follows: the Tribunal examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts) ; (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is within the power of the Respondent; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. (Cf. Judgement No. 897, *Jhuthi*, para. II, (1998)). This listing is not intended to be exhaustive.

XI. In this case, the issues raised are:

(i) Whether the evidence warranted the finding of misconduct upon which the decision to terminate employment was based;

(ii) Whether there was an improper motive or prejudice on the part of the Administration; and

(iii) Whether the sanction of dismissal was disproportionate to the misconduct.

XII. In regard to the first issue, there were three grounds on which the Administration based its finding that misconduct had been proven: (i) the Applicant engaged, without permission, in private medical practice and thus violated the Staff Regulations; (ii) the Applicant violated the Staff Regulations and Staff Rules by arranging without prior approval a written interview which resulted in a publication in a local magazine, ostensibly describing voluntary activities of a local charitable organization in Syria of which he was a member but focussing to a great extent on services rendered by UNRWA without proper acknowledgement; and (iii) the Applicant had been involved in receiving money from a

non-governmental organization, which was questionable conduct and a violation of the Staff Regulations and Rules, although there was no financial loss caused to UNRWA.

XIII. In regard to the above grounds, the Tribunal finds that the conclusions upon which the decision to terminate the Applicant's employment was based, were supported by the evidence on record. There was ample evidence that the Applicant was maintaining without permission an outside activity which was prohibited by the Staff Regulations. The Applicant admits this. There was in addition evidence, particularly in the light of the Applicant's own written undertaking to discontinue his private practice at the time he took up employment, that he knew that he was carrying on a prohibited outside activity. The Applicant does not deny knowledge of wrongdoing. This evidence was sufficient ground, in the opinion of the Tribunal, for terminating the Applicant's employment. In this connection the claim that the Applicant's superior was aware of the Applicant's misconduct for some time has no relevance to either the finding that he had engaged in the conduct or to the illegality of such conduct.

The Tribunal also concludes that there is sufficient evidence in the record to establish the other two grounds on which the termination decision was based. The evidence established that the Applicant gave an unauthorized interview and that he dealt with a non-governmental organization improperly. Both actions constituted conduct not in keeping with the status of a staff member of the Agency and violated the Staff Regulations and Rules.

XIV. The Applicant also alleges prejudice against him on the part of the Administration. It is in this regard that account must be taken of the Applicant's claims that his superior knew for some time that he was running a private clinic without permission and that other officers in UNRWA were also carrying on outside activities of a like nature. Neither fact, if true, would conclusively establish that there was prejudice against the Applicant. The Tribunal would point out, particularly, that by itself the fact that others engaged in similar conduct but were not investigated does not exonerate the Applicant by rendering the action taken against

him as motivated by prejudice. Nor does it prove that the Applicant was investigated and found at fault because the Agency was acting in a discriminatory manner.

XV. The Tribunal finds that the sanction of termination of employment is not disproportionate in the light of the misconduct of which the Applicant was found guilty. As already stated, the Applicant's violation of the law by engaging in unauthorized outside activity was serious enough to warrant dismissal. The other two grounds for the sanction only served to compound the seriousness of the Applicant's offences.

XVI. For the foregoing reasons, the Tribunal dismisses the application in its entirety.

(Signatures)

Hubert THIERRY
President

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

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AT/DEC/940
19 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 940

Case No. 1025: NAG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Debabrata Nag, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 11 November 1996, 12 February and 28 May 1997, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February and 30 June 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 26 June 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, *inter alia*:

"...

10. ... *to find* that:

(a) The Applicant was terminated without justification;

(b) The appropriate rules and procedures were violated;

(c) He was treated in a prejudicial manner;

(d) The appointment and promotion process was vitiated with irregularities;

(e) [As a result of] (c) and (d) above, the Applicant was denied his due process rights.

11. ... [H]aving found that the termination was unjustly implemented ... *to order* that the Applicant be reinstated retroactively from the date of his termination."

Whereas the Respondent filed his answer on 7 December 1998;

Whereas the Applicant filed written observations on 17 February 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in Dhaka, Bangladesh, on 17 December 1979, at the G-3, step 1 level, as a Finance Clerk on a short-term appointment. He was given a fixed-term appointment on 1 June 1980 and his functional title was changed to Clerk/Typist. Between 31 August 1980 and 31 December 1987, he received a series of fixed-term appointments for varying periods. He was given a probationary appointment effective 1 October 1987, and on 1 April 1988, his appointment was converted to permanent.

For the period covering 17 December 1979 to 31 July 1989, the Applicant's performance was evaluated in five performance reports. In the first report, covering the period from 17 December 1979 to 31 October 1981, he was evaluated by the Finance Officer and received ratings of "Good" for job knowledge and competence, and an overall rating of

"[a] competent and well-qualified staff member whose performance meets expected standards." In the second to the fifth reports, covering the period from 1 November 1981 to 31 July 1989, he was evaluated by the Fellowship Officer. In the report for the period of 1 November 1981 to 31 December 1983, he received "Good" for job knowledge and competence and the overall rating was the same as in the first report. In the reports for the periods covering 1 January 1984 through 31 May 1987, his job knowledge and competence was rated "Very Good" and his overall rating was "[a]n excellent staff member whose performance exceeds expected standards". In the fifth report covering from 1 June 1987 to 31 July 1989, the rating for job knowledge and competence remained "Very Good" but the overall performance reverted to the original rating of "[a] competent and well-qualified staff member whose performance meets expected standards".

The next three performance reports, covering the period 1 August 1989 through December 1992, the Applicant's performance was evaluated by three different supervisors. In the first one, from 1 August 1989 to 31 August 1990, the Applicant received a rating of "Below standard" for job knowledge and competence, and an overall rating of "[a] staff member whose performance is moderate but does not meet expected standards". The second and third reports followed the Performance Appraisal Review (PAR) system. The supervisor's rating from January to December 1991 was "Meets some of the expectations of the performance plan but performance needs improvement", and accordingly the final management review rating was "4". In the report from January to December 1992, the supervisor's rating was "Meets the expectations of the performance plan", but the final management review was "Meets some of the expectations of the performance plan but performance needs improvement", with an overall rating of "4".

On 16 September 1993, the Head of Personnel advised the Assistant Resident Representative that the Applicant, having completed five years under permanent appointment, was due for the five-year review called for under staff rule 104.13 (a) (ii), and requested

advice on whether the Applicant had maintained the required standard of efficiency, competence and integrity.

By memorandum dated 29 September 1993, the Assistant Resident Representative informed the Head of Personnel that while the Applicant had initially met expected standards, the reports covering the period August 1989 through January 1992 described his performance as below the expected standard.

The local Appointment and Promotion Panel (APP) of UNDP, Dhaka, Bangladesh, reviewed the first five years of Applicant's permanent appointment at its meetings No. 7/93 and 8/93 held respectively on 4 and 11 November 1993. The relevant paragraph regarding the case of the Applicant in the Panel's report reads as follows:

> "The panel thoroughly reviewed the documentation submitted by the administration. The latter indicates that the staff member has been a substandard performer for the last four years. Although the staff member was categorically urged to remedy this situation and warned to improve his shortcomings by the Management Review Group in his previous PAR, [the Applicant] did not take any initiative to improve or to remedy these shortcomings. The immediate supervisor's report also confirms the panel's conclusion. In view of the fact that [the Applicant] has failed to maintain a minimum standard of efficiency, competence and integrity established in the Charter during the period of his permanency, the members of the APP unanimously agreed to recommend discontinuation of his permanent appointment with UNDP."

On 9 March 1994, the APP's recommendation was referred to a joint review body (JRB) for advice, in accordance with the applicable provisions of the UNDP Personnel Manual. The three-member of the JRB, which included a staff representative, reviewed the documentation and interviewed several people, including the Applicant. The JRB report stated, *inter alia*, as follows:

> "A review of the PARs for 1991-1993 reveals that [the Applicant] has always agreed with the comments of [his] supervisors. Surprisingly, [the Applicant] in his letter [to the JRB] claims that for the sake of maintaining good relationship he always

accepted the comment and ratings of his supervisors. ... [the Applicant] has been working in the system for more than 14 years and it is difficult to believe that he was not aware of the consequences of the consistent poor ratings over time.

[The Applicant] mentions in his letter ... that due to frequent movements 'the performance evaluators have had little scope to judge my appropriate skills and efficiencies'. It is true that he had to work under several supervisors but with the change of supervisors the nature of his job did not change. All the supervisors (1989-93) maintained that [the Applicant] lacked technical skill in respect of typing letters, taking telephone messages accurately, filing documents consistently and also he was sluggish and lack[ed] organized approach to his job."

The final paragraph of the JRB report recommended as follows:

"There [is] sufficient evidence to prove the inefficiency of [the Applicant]. So it is recommended that his permanent contract be terminated as recommended by the 7th meeting of the 1993 Appointment and Promotion Panel."

The Resident Representative noted her concurrence with the recommendation on 19 June 1994.

On 6 November 1994, the Assistant Resident Representative, UNDP, certified that the Applicant's performance and conduct were "satisfactory and warrant [a] salary increment". On 1 December 1994, the Applicant received a further within-salary increment.

On 2 December 1994, the Administrator, UNDP, approved the proposal of the Director, Division of Personnel (DOP), that the Applicant's permanent appointment be terminated for unsatisfactory performance in accordance with the provisions of staff regulation 9.1 (a), and also in "line with the PAR process which allows for termination following three consecutive '4' ratings and where coaching and training have not corrected the problem."

The Applicant was informed by the Acting Resident Representative on 28 December 1994 of the Administrator's decision to separate him from service.

On 25 February 1995, the Applicant requested a review, under the terms of staff rule 111.2 (a), of the decision to terminate his appointment. The decision of the Administrator was maintained in a letter to the Applicant, dated 29 March 1995, from the Chief, Legal Section, DOP, noting that all the required procedures had been followed in the Appellant's case and he had therefore been accorded due process.

On 25 May 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB unanimously adopted its report on 30 May 1996. Its considerations, conclusions and recommendations read, *inter alia*, as follows:

> ***"Considerations***
>
> 21. The Panel first considered the question whether or not the Appellant's due process rights were respected.
>
> 22. The Appellant contends that in as much as the vice-chairman of the local APP, who was a member of the local APP which recommended the termination of his permanent contract, was also a member of the JRB which reviewed that APP's recommendation, the requirements of due process were not satisfied.
>
> 23. The Respondent counters that the JRB was established strictly in accordance with the applicable provisions of the UNDP Personnel Manual and that the decision by the Administrator of UNDP to terminate the permanent appointment of Appellant was made only after the matter had been reviewed by two independent bodies, the APP and the JRB.
>
> 24. The Panel noted that the procedure to satisfy the requirement of due process in case of termination of a permanent appointment is provided for in section 10800 (1.6) (d) (Revised edition, November 1991) of the UNDP Personnel Manual, and that section 10800 (1.6) (d) (i) (1) provides, *inter alia*: '... The joint review body consists of the vice-chairman and two alternates of the Appointment and Promotion Panel. ...' The Panel found, and was of the view, that the composition of the JRB was in conformity with the provisions of the UNDP Manual.
>
> 25. The Panel noted, however, and was concerned that there were lapses on the part of the Administration, as well as disturbing contradictions in the action of the

Administration which raised false expectations in the Appellant, which tend to show that the Appellant was unfairly treated. For example:

(i) During the period 17 December 1979 to 31 July 1989, the Appellant's PER ratings were 'very good'; they dropped suddenly in the subsequent PER to 'below standard'. What might have caused the sudden decline in the Appellant's performance? Were his earlier ratings justified?

(ii) The Appellant was regularly awarded within-grade salary increments, with the last award effective 1 December 1994, notwithstanding the process to effect his termination for unsatisfactory performance was begun on 11 November 1993. Was the Assistant Resident Representative unaware of the Appellant's pending termination?

(iii) The Administration was seemingly insensitive to the welfare of the Appellant and of the underlying cultural differences, as was evident from its handling of his illness in 1990, and its seeming unwillingness to meet with the Appellant, despite several requests.

26. While the Panel noted the foregoing lapses on the part of the Administration, it did not find, however, that they were motivated by prejudice or any other extraneous factor.

27. In considering the Appellant's appeal, the Panel was not unmindful that '[i]n the case of termination on grounds of inefficiency or relative efficiency, the Panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor'. (Staff rule 111.2 (k)).

Conclusions and recommendations

28. The Panel *unanimously agreed* that the Appellant's due process rights were respected.

29. Given the false expectation which was raised in the Appellant by periodic within-grade increments, coupled with the lack of sensitivity on the part of the Administration, the Panel *unanimously agreed* that the Appellant was unfairly treated and thus injured.

30. The Panel *unanimously recommends* that, as a symbolic gesture, the Appellant be paid compensation in the amount of three months of his net salary for the injury he sustained.

31. The Panel *agreed* to make no further recommendation in support of the appeal."

On 2 July 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him, in part, as follows:

"...

The Secretary-General has examined your case in the light of the Board's report and is in agreement with the Panel that your due process rights were respected. He is not in agreement with the Panel that you were unfairly treated or injured by the actions of the UNDP Administration and specifically does not consider that the award to you of periodic within-grade increments was unfair or caused you injury. Accordingly, the Secretary-General has decided not to accept the Panel's recommendation that you be paid compensation for injury sustained. As your due process rights were respected, the Secretary-General has decided to take no further action in respect of your case.

The above-mentioned decision of the Secretary-General is 'the final decision on the appeal' mentioned by staff rule 111.2 (o). Therefore, any recourse should be addressed to the Administrative Tribunal.

..."

On 26 June 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant was treated unfairly, was denied due process and his termination from service was vitiated by prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment was in accordance with the Staff Regulations and Rules.

2. The Applicant was afforded full due process.

3. The Applicant has produced no evidence that the decision of the Administration was based on prejudice or extraneous factors.

The Tribunal, having deliberated from 4 to 19 November 1999, now pronounces the following judgement:

I. The Applicant's employment was terminated for unsatisfactory service on 31 December 1994, after he had worked for UNDP in Dhaka, Bangladesh, on dixed term appointments from 17 December 1979, until he became a permanent staff member on 1 April 1988. He complains that:

(i) His employment was terminated without justification;

(ii) There was prejudice against him;

(iii) The appointment and promotion process was vitiated by procedural irregularities; and

(iv) As a consequence of (ii) and (iii) above he was denied due process.

II. The Tribunal holds that, in accordance with general principles of international administrative law and as in the case of other administrative decisions such as transfer (Judgement No. 167, *Fernandez Rodriguez* (1973)) and promotion (Judgement No. 275, *Vassiliou* (1981)), the Administration has discretionary authority to terminate appointments for unsatisfactory service. The determination whether performance is unsatisfactory is also a matter within the discretion of the Administration. As in the case of discretionary powers in

general (cf. Judgements No. 616, *Sirakyan* (1993); No. 834, *Kumar* (1997); No. 862, *Szekielda* (1997); and No. 892, *Sitnikova* (1998)), the Tribunal will not substitute its judgement for that of the Respondent. However, the discretion to terminate employment for unsatisfactory service is not unfettered. In general, the Tribunal reviews the exercise of discretion to determine whether it is vitiated by substantive or procedural irregularity, by improper motive or purpose or prejudice or by any other abuse of discretion.

III. In this case there is no evidence that the determination that the performance of the Applicant was unsatisfactory was substantively flawed. The Applicant's performance had been rated since 1991, as "needs improvement", so that there were ample grounds for treating his performance as not meeting expectations. Thus, there was no error of fact or erroneous conclusion which would substantively have tainted the decision.

IV. In regard to the manner in which his unsatisfactory performance and termination were handled, the Tribunal notes that the Applicant received notice well before his appointment was terminated. In addition, the Respondent claims that the Applicant was given "coaching and training" in order to help him overcome his problems and to improve his performance. Thus, the Applicant was or should have been fully aware that the Administration was not satisfied with his performance for a number of years. He failed to remedy the defects in his performance. The fact that the Applicant was never denied the normal within-grade salary increment does not alter the situation. It by no means should have given him the impression that his overall performance was treated as satisfactory.

V. There are some other aspects of procedure that are disturbing, however. No performance review, under the Performance Appraisal Review (PAR) system, was prepared for the period September 1990 to February 1991, and contrary to the requirements of administrative instruction UNDP/ADM/23 of 16 March 1990 outlining the PAR system, one

annual review was prepared by someone who had supervised him for a period of only three months. In addition, another review was prepared by someone who was at no time his supervisor. Furthermore, a certification given one month before his appointment was terminated for purposes of a within-grade salary increment described his performance as "satisfactory". It is unnecesary to determine whether, if these flaws had not been present, the Administration's conclusion that the Applicant's performance was unsatisfactory would have been changed, particularly given the overwhelming evidence of poor performance. However, in the light of the Tribunal's jurisprudence which has emphasized the importance of having formal performance reviews not only done but properly done (cf. Judgements No. 246, *Fayemiwo* (1979); and No. 356, *Giscombe*, (1985)) the Tribunal holds that such injury done to the Applicant by the failure to fulfill the requirements relating to performance reviews deserves compensation, because such failure could have affected the Applicant's right to be evaluated properly in terms of the quality of his performance. In addition, the Tribunal stresses the importance of transparency in dealing with matters of performance and characterizes the lack of it as a flaw. In its view, the Applicant was also treated unfairly in this regard. These flaws are not serious enough to justify the quashing of the decision to terminate the Applicant's services but they are, nevertheless, not marginal and, therefore, the Applicant must be compensated for the injury done to him.

VI. The Applicant also alleges prejudice on the part of his supervisors. The allegations of prejudice are, however, not substantiated. Where prejudice or improper motive is alleged by the Applicant to have vitiated the termination decision, the burden is on him to provide evidence to support his allegation (cf. Judgements No. 581, *Narula* (1992); No. 613, *Besosa* (1992); and No. 639, *Leung-Ki* (1994)). On the basis of all the evidence on the record the Tribunal will then decide whether on the balance of probabilities the allegation has been proved. In this case the Applicant has not proffered any evidence to support his allegations so

that the record does not show that there was prejudice or improper motive on the part of the Respondent. This claim is, therefore, dismissed.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant an amount equal to three months of his net base salary, at the rate in effect on the date of his separation from service, as compensation for the irregularities noted.

VIII. All other pleas are rejected.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/941
19 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 941

Case No. 1026: KIWANUKA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Ms. Marsha Echols;

Whereas at the request of Samuel Kiwanuka, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended until 31 January, 30 April and 31 July 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 17 July 1998, the Applicant filed an application requesting the Tribunal, *inter alia*:

"*... Pleas*

7. With respect to competence and procedure ...

...

(d) *To order* production of the reply of the Chairperson, JDC [Joint Disciplinary Committee] to the memorandum of 9 July 1997 from the Under-Secretary-General for Administration and Management.

8. On the merits ...

(a) *To rescind* the decision of the Secretary-General summarily dismissing the Applicant;

(b) *To order* that the Applicant be immediately reinstated with full salary and benefits from the date of his separation from service;

(c) *To find and rule* that the manner in which the Office of Internal Oversight conducted its investigation of the Applicant [was] procedurally flawed and violated his right to due process;

(d) *To find and rule* that the suspension without pay of the Applicant for ten months was arbitrary, based on hearsay and exceeded the discretionary authority of the Secretary-General;

(e) *To find and rule* that the lengthy delays in and the reopening of the Joint Disciplinary Committee proceedings violated the Applicant's right to a timely and fair hearing;

(f) *To find and rule* that the Applicant's right to due process and a fair hearing were violated by the Respondent's *ex post facto* submission of totally irrelevant material to the JDC on behalf of the Office of Internal Oversight;

(g) *To find and rule* that the decision by the Under-Secretary-General for Administration and Management to impose summary dismissal after the Joint Disciplinary Committee had exonerated him of all the allegations made against him was procedurally flawed, arbitrary, improperly motivated and based upon mistakes of law and of fact;

(h) *To adjudge and declare* that the decision of the Respondent to reject the conclusions of the Joint Disciplinary Committee, which exonerated the Applicant of any wrongdoing, was unsupported by the evidence, occasioned a failure of justice and should be rejected;

(i) *To order* that in addition to reinstatement the Applicant be awarded damages in the amount of three years' net base pay for the violation of his rights and for the resulting damage to himself, his family and his professional reputation."

Whereas the Respondent filed his answer on 11 June 1999;

Whereas the Applicant filed written observations on 3 November 1999;

Whereas, on 8 November 1999, the Respondent submitted an additional statement;

Whereas, on 3 November 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 6 August 1993, in the Field Administration and Logistics Division, Department of Peace-keeping Operations (DPKO), on a one-year fixed-term appointment at the P-3 level as Deputy Chief Finance Officer, United Nations Peace-keeping Force in Cyprus (UNFICYP). His functional title was changed to Chief Finance Officer (CFO) on 6 February 1994. He received further extensions of his fixed-term appointment, through 31 May 1997. On 1 July 1996, he was suspended without pay pending the resolution of charges of misconduct which had been brought against him. In April 1997, this was converted to suspension with pay, retroactive to 1 December 1996. He was summarily dismissed with effect from 19 July 1997.

On 1 July 1996, the Officer-in-Charge, Procurement Section, UNFICYP, wrote to the Officer-in-Charge, Administration, reporting that someone had tampered with the Procurement Section's computer program for ration requisitioning. He stated, *inter alia*, as follows:

> "...
>
> 3. ... the changes done [are] not consistent with a typo from my side and I would have had no reason to [make such changes], I find it very odd ... [S]omehow a person knowing the procedure of ordering ha[s] entered the rations order program and deliberately changed the files. ...
>
> 4. ... I feel someone intentionally [has] tried to discredit me and my duties in the section and therefore request your assistance to investigate the matter ... If

> necessary relieve me from responsibilities within the section ... until the matter [has] been resolved and further, that for security reason changes be made immediately within the system so that a similar incident cannot occur in the future."

On 2 July 1996, a Captain of the Irish Independent Defense Force serving as the Force Catering Officer (FCO), UNFICYP, submitted a hand-written Witness Statement, making a number of allegations. On 6 May 1996, the CFO instructed him to make a change in the standard operating procedures for procuring rations for the duty station, asking him to certify that "the invoices were correct [before forwarding them to the CFO] for payment". On 11 May 1996, the FCO met with the former FCO, who was visiting Cyprus, who told him: "there was money to be made as the Force Catering Officer" and cited as an example " that his car had been paid for by a contractor". On 12 May 1996, the FCO was taken by the former FCO and the CFO in the latter's car to a warehouse of a supplier of fresh produce, informed by them about a "system they had operated for a period of time without any detection" and asked to participate in the scheme which involved submission of "false invoices to the Chief Finance Officer [the Applicant] who subsequently issued monies for these false invoices without detection." The FCO was told that his cooperation was necessary for the scheme to continue and offered a monthly payment. On 13 May 1996, the FCO was given a number of false invoices by the CFO, despite his insistence that he did not want any part in the scheme. The FCO also alleged that he taped the conversation in the supplier's warehouse during the 12 May meeting and that he gave the tape to the Force Provost Marshal, UNFICYP, on 2 July 1996.

On the same date, 2 July 1996, the Chief Administrative Officer, UNFICYP, sent a fax to the Under-Secretary-General, DPKO at Headquarters, attaching the two above-mentioned documents dated 1 and 2 July 1996, stating that it was of the "utmost urgency to secure all possible evidence contained in records or computerized files" and it "would be greatly appreciated if a qualified investigator could be sent to UNFICYP immediately."

On 3 July 1996, the Director, Field Administration and Logistics Division, sent a

copy of the fax from the Deputy Special Representative of 2 July 1996 to the Chief, Investigations Section, Office of Internal Oversight Services (OIOS), requesting that an investigator be dispatched as soon as possible.

Also on 3 July 1996, the Officer-in-Charge, DPKO, reported the case to the Assistant Secretary-General, Office for Human Resources Management (OHRM), in accordance with paragraph 3 of ST/AI/371, and recommended, in view of the gravity of the accusations, that the Applicant be suspended without pay with immediate effect.

On 4 July 1996, the Force Commander and Acting Chief of Mission, UNFICYP, informed the Applicant that "serious allegations [had] been levelled against [him] that [he was] directly involved in an on-going scheme to defraud the Organization in connection with the procurement of food rations by UNFICYP from a local contractor" and that in view of the serious nature of allegations and in the interest of the Organization, the Secretary-General had decided that he be placed on suspension from duty without pay pending investigation, for a probable duration of three months, without prejudice to his rights.

On 24 July 1996, an "Investigation Team" travelled to UNFICYP and conducted a four-day investigation into the allegation. (The team returned in September 1996 for four days to finalize the investigation).

On 30 July 1996, the Applicant requested administrative review of the decision to suspend him without pay.

On 3 October 1996, OIOS submitted its report. In his covering memorandum of the same date to the Under-Secretary-General, DPKO, the Under-Secretary-General, OIOS, indicated that the evidence adduced by the investigation, which included interviews and an analysis of the records, confirmed the allegations of serious wrongdoing on the part of the Applicant, the former Force Catering Officer and a supplier of fresh fruit and vegetables.

On 25 October 1996, the Director, Specialist Services Division, OHRM, forwarded the OIOS report to the Applicant. She informed him that, on the basis of this report, he was charged with "engag[ing] in a scheme to defraud the United Nations by the misappropriation

of [fresh fruit and vegetables] ration funds." The Applicant was asked to respond to the charges within two weeks, and notified of his right to counsel. He was also informed that the Secretary-General had decided to extend his suspension without pay for a further three months as from 4 October 1996.

On 31 October 1996, the Applicant wrote to the Joint Appeals Board requesting a stay of action, and appealing the decision to suspend him from duty pending investigation.

On 15 November 1996, the Applicant replied to the charges of misconduct. Denying that he had ever been part in any scheme to defraud the United Nations, he claimed that the allegations made by OIOS were false and that some of the statements made by the FCO were "completely untrue". He also claimed that OIOS violated the Staff Regulations and Rules and denied him due process.

On 4 December 1996, the Assistant Secretary-General, OHRM, informed the Applicant that he had decided to refer the matter to a Joint Disciplinary Committee (JDC) for advice, and advised him of his rights under the applicable provisions of administrative instruction ST/AI/371.

On 8 January 1997, the Assistant Secretary-General, OHRM, requested the Secretary of the JDC to consider the case on an expedited basis, in view of the sensitive nature of the case and the fact that the Applicant had been suspended from duty without pay for over six months.

On 13 January 1997, the Applicant's suspension without pay was again extended on a month-to-month basis, through the completion of the disciplinary proceedings.

On 7 April 1997, the Applicant was informed that the Under-Secretary-General for Administration and Management had decided to convert his suspension *without* pay to suspension *with* pay, retroactive to 1 December 1996.

On 15 May 1997, the Applicant requested that the effective date for conversion to suspension with pay be changed retroactively to 4 July 1996.

The JDC submitted its report on 22 May 1997. Its conclusion and recommendation read as follows:

> "XIV. ...*CONCLUSION*
>
> 109. The Panel concludes that there has been no credible evidence presented that [the Applicant] had participated in or received any benefits from acts of misconduct against the United Nations.
>
> XV. ... *RECOMMENDATION*
>
> 110. The Panel recommends to the Secretary-General that the charges against this staff member be dropped; that the case be closed and that the staff member be reinstated with proper and appropriate compensation in order to mitigate any damages he may have suffered as a result of the charges which had been levied against him."

On 12 June 1997, the Under-Secretary-General for Administration and Management, addressed letters in similar terms to the Applicant and the Under-Secretary-General, OIOS, asking both parties whether there was any additional information they wished to provide.

On 16 June 1997, the Applicant responded that he felt that the JDC "took into account all of the facts and supporting evidence ... submitted to them ... [and that he was] not aware of any additional facts ... that [had] not been submitted to the JDC".

On 7 July 1997, the Under-Secretary-General, OIOS, responded to the Under-Secretary-General for Administration and Management's inq... and transmitted to him an additional 11-page report with various attachments pertaining to forensic analysis of the tape submitted by the FCO.

On 9 July 1997, the Under-Secretary-General for Administration and Management forwarded to the Chairperson, JDC, the replies received from the Applicant and from OIOS. He drew the Chairperson's attention to the results of the forensic analysis, which he said had been conducted only after the JDC had completed the case. He asked for any additional

views the Committee might have in light of this new information.

On 14 July 1997, the Applicant submitted to the JDC further comments on the OIOS additional report.

On 18 July 1997, the Under-Secretary-General for Administration and Management, informed the Applicant as follows:

> "...
>
> The Secretary-General has examined your case in the light of the Committee's report, additional information subsequently brought to his attention, the Committee's memorandum of 18 July 1997, as well as on the basis of the entire record, including all the statements made by you and by your Counsel on your behalf. He does not, however, share the Committee's conclusions and recommendations.
>
> The Secretary-General notes that three forensic experts have concluded that there is no evidence that the tape which implicates you in a conspiracy to defraud the United Nations by the misappropriation of rations funds is other than a genuine recording which has not been altered or tampered with in any way. ...
>
> In the view of the Secretary-General, the [genuineness] of the tape is also supported by testimonies of others who participated in the taped conversation and by the evidence of efforts that you made to conceal over expenditures of rations funds through misleading statements. It is also supported by the fact that the amounts invoiced by the contractor for the fruit and vegetables exceeded the requisitioned amounts.
>
> The Secretary-General is not in a position to accept the Committee's statement ... that 'only an audit performed by an independent party or entity might have had credibility in such matters' and that 'it would have been speculative for [the Committee] to have given credence to financial information which had been offered [by OIOS] without reasonable assurances that it had been accurate'. The Secretary-General wishes to point out that OIOS exercises operational independence and its mandate provides it with the authority to undertake internal audits, which OIOS indeed conducted in connection with your case.
>
> The Secretary-General has thus concluded that the charges are well-founded and that your actions constitute serious misconduct. The Secretary-General in

choosing an appropriate penalty has been influenced by the fact that you were the Chief Financial Officer of UNFYCIP and that you have abused a position of responsibility and trust. He has, therefore, decided to summarily dismiss you pursuant to staff regulation 10.2, paragraph 2, and staff rule 110.3 (a) (viii) with effect from 19 July 1997. ..."

On 17 July 1998, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The preliminary investigation by the OIOS violated the Applicant's rights to due process and fair treatment.

2. The Applicant's suspension without pay for over ten months was unauthorized, unjustified, improperly motivated and harmful to him and his family.

3. The disciplinary proceedings were tainted by delay, improper procedure and denial of due process.

4. The final decision to reject the findings and conclusions of the JDC in order to summarily dismiss the Applicant was improper and ill-founded.

Whereas the Respondent's principal contentions are:

1. The investigation into the allegations against the Applicant was not improperly motivated, and the Applicant's due process rights were respected.

2. The Applicant's suspension was a proper exercise of the Respondent's discretion.

3. The Respondent is not bound to accept the conclusions and recommendations of the JDC. The decision to summarily dismiss the Applicant was a valid exercise of the Respondent's disciplinary authority.

The Tribunal, having deliberated from 3 to 19 November 1999, now pronounces the following judgement:

I. The Applicant appeals the Respondent's decision of 18 July 1997, rejecting the JDC recommendation to exonerate the Applicant from charges against him, and instead summarily to dismiss him under the terms of staff rule 110.2. The Applicant claims that the Respondent improperly exercised his discretionary authority in rejecting the findings and recommendation of the JDC. He further claims that the Respondent's disciplinary proceedings were tainted by delay and improper procedure, which together constituted a violation of his right to due process and fair treatment.

II. The case concerns the imposition of a disciplinary sanction. As early as 1953 (Judgement No. 29, *Gordon*) the issue of disciplinary measures engaged the attention of the Tribunal. The jurisprudence on the subject has developed considerably since then. The Tribunal has made a variety of general statements. Many of these have been determined by the issues arising in the case before the Tribunal. For example, in Judgement No. 583, *Djimbaye*, paragraph VI (1992), it was said that "... in disciplinary matters the Secretary-General has a broad power of discretion. Its exercise can only be questioned if due process has not been followed or if it is tainted by prejudice or bias or other extraneous factors." (Cf. Judgements No. 351, *Herrera*, para. VII (1985); No. 529, *Dey*, para. V (1991); No. 582, *Neuman*, para. III (1992); and No. 584, *Adongo*, para. I (1992)). In its jurisprudence, the Tribunal has "consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional conditions, e.g. in cases of failure to accord due process to the affected staff member before reaching a decision." (Judgements No. 300, *Sheye*, para. IX (1982); and No. 210, *Reid*, para. III (1976)).

In Judgement No. 479, *Caine*, paragraph III (1990), the Tribunal clarified and

expanded this somewhat. The Tribunal will intervene when the administrative action is "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact". (Cf. Judgement No. 641, *Farid*, para. IV (1994)).

III. The jurisprudence thus has been developing and definitions have been refined. In reviewing this kind of quasi-judicial decision and in keeping with the relevant general principles of law, in disciplinary cases the Tribunal generally examines (i) whether the facts on which the disciplinary measures were based have been established; (ii) whether the established facts legally amount to misconduct or serious misconduct; (iii) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); (iv) whether there has been any procedural irregularity; (v) whether there was an improper motive or abuse of purpose; (vi) whether the sanction is legal; (vii) whether the sanction imposed was disproportionate to the offence; (viii) and, as in the case of discretionary powers in general, whether there has been arbitrariness. This listing is not intended to be exhaustive. Most recently in Judgement No. 898, *Uggla*, paragraph II (1998), the Tribunal made a similar general statement.

IV. Clearly the Tribunal takes the view that the imposition of disciplinary sanctions involves the exercise of a discretionary power by the Administration. It further recognizes that, unlike other discretionary powers, such as transferring and terminating services, it is also a special exercise of quasi-judicial power. For these reasons the process of review exercised by the Tribunal is of a particular nature. The Administration's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily.

V. In regard to (i) in paragraph III above, the Tribunal makes a judgement based on its examination of the facts. In regard to (ii) in paragraph III above, the Tribunal judges

whether the characterization of misconduct or serious misconduct is, in its opinion, appropriate, which is a matter of law.

VI. In connection with (i), the Tribunal has in the past used such descriptions as "mistake of fact" (Judgement No. 529, *Dey*, para. VII (1991)), "supported by cogent evidence" (Judgement No. 928, *Abdul Hadi et al.*, para. IX (1999)) "ample evidence to justify" (ibid., para. III), "conclusions supported by evidence (Judgement No.756, *Obimba*, para. II (1996)), "allegations are well founded" (Judgement No. 797, *Bouras*, para. VIII (1996)), "ample evidence for JDC to conclude" (Judgement No. 897, *Jhuthi*, para. IV (1998)), and "evidence supports conclusions" (Judgement No. 830, *Anih*, para. V (1997)). What the Tribunal must examine is whether the findings of fact against the Applicant made by the Administration can be supported by the evidence on the record. Without substituting its own judgement for that of the Administration (cf. Judgements No. 490, *Liu* (1990), and No. 616, *Sirakyan* (1993)), it makes a judgement on whether the findings of fact are reasonably justifiable and supported by the evidence. If the Tribunal judges that the material findings of fact cannot be supported by the evidence, it may disagree with the conclusions of the Administration based on the evidence. Needless to say, the Tribunal examines the facts and the evidence critically and fully and reviews the Administration's decision.

VII. In regard to (ii), in paragraph III above, i.e. determining whether the established facts legally amount to misconduct or serious misconduct, the Tribunal will in its review decide whether it agrees that the Administration, in exercising its discretion, has, according to the written law and general principles of law, made the appropriate characterization. For example, in Judgement No. 927, *Abdul Halim et al.* (1999), with regard to the Applicant Husary, the Tribunal held that an error of judgement on the part of the Applicant resulting in loss of confidence on the part of the Commissioner-General of UNRWA would not be characterized as misconduct.

VIII. On 25 October 1996, the Applicant was asked to respond within two weeks to allegations of misconduct. After receiving the Applicant's rebuttal of the allegations, the Respondent decided to submit the case to the JDC for a recommendation. The unanimous recommendation of the JDC, on 22 May 1997, was that no disciplinary measures be taken against the Applicant and that he should be awarded "proper and appropriate compensation in order to mitigate any damages he may have suffered as a result of the charges which had been levied against him." On 18 July 1997, the Respondent issued the decision rejecting the JDC's findings.

Contrary to the JDC's recommendations to exonerate the Applicant from all charges made against him, the Respondent determined that the Applicant was guilty of the charges and summarily dismissed him. Central to the Respondent's decision to reject the JDC's findings was the probative weight of the tape recording evidence that implicated the Applicant.

The JDC's belief that "tape recordings can easily be edited, dubbed and/or altered" led to its conclusion that the tape recording might have been tampered with. The Tribunal has held that the burden of proof rests with the Respondent to produce evidence that raises a raisonable inference that misconduct has occurred. If a prima facie case is made, the Applicant must provide a proper explanation or evidence to rebut that case. Otherwise, the conclusion of misconduct could be reached (Judgement No. 897, *Jhuthi*, para. IV (1998)). The Tribunal finds that the Applicant's explanation that the tape recording lacked credibility or authenticity and had been tampered with was merely an unsubstantiated allegation that contradicted the evidence of experts.

IX. The Tribunal emphasizes further that the recommendations and conclusions of the JDC are advisory and need not be accepted by the Administration. The Respondent has the discretion to reach a different conclusion after consideration of all the facts and circumstances of the case. (Cf. Judgements No 494, *Rezene* (1990); No. 529, *Dey* (1991);

No. 551, *Mohapi* (1992); No. 582, *Neuman* (1992); No. 641, *Farid* (1994); and No. 673, *Hossain* (1994)).

X. Although it is within the Respondent's discretion to reject the JDC's recommendation and exercise disciplinary authority, disciplinary measures must be taken with regard to due process and fair treatment. The Applicant claims that the Respondent's handling of disciplinary measures and proceedings was tainted by delay, improper procedure and as a result violated his right to due process and fair treatment.

The Applicant argues that his suspension without pay for over ten months was unauthorized, improperly motivated, and exceeded the Respondent's discretionary authority. On 4 July 1996, the Applicant was suspended without pay pending the resolution of charges of misconduct which had been brought against him. On 7 April 1997, the Applicant was informed that the Under-Secretary-General for Administration and Management had decided to convert his suspension without pay to suspension with pay, retroactive to 1 December 1996. The Applicant was summarily dismissed with effect from 19 July 1997. For almost five months he was in effect suspended without pay.

XI. Staff rule 110.2 provides in its pertinent part that:

> "If a charge of misconduct is made against a staff member and the Secretary-General so decides, the staff member may be suspended from duty during investigation and pending completion of disciplinary proceedings for a period which should normally not exceed three months. Such suspension shall be with pay unless, in exceptional circumstances, the Secretary-General decides that suspension without pay is appropriate."

Moreover, paragraph 5 of ST/AI/371 "Revised disciplinary measures and procedures" provides that:

> "On the basis of the evidence presented, the Assistant Secretary-General, on behalf of the Secretary-General, shall decide whether the matter should be pursued, and, if so, whether suspension is warranted. Suspension under the staff rule 110.2 (a) is normally with pay, unless the Secretary-General decides that exceptional circumstances warrant suspension without pay, in both cases without prejudice to the staff member's rights."

The Respondent claims that the allegations against the Applicant were sufficiently serious, and the evidence substantial enough, to constitute "exceptional circumstances" in which suspension without pay was appropriate in light of the Applicant's position as Chief Finance Officer of UNFICYP. The Respondent expected that the investigation would be completed more quickly than it was. Furthermore, he expected that the JDC would have been able to complete its review of the case more expeditiously. When it became clear that there was likely to be no speedy resolution of the JDC case, and in view of the length of time the Applicant had been suspended without pay, the Under-Secretary-General for Administration and Management, decided on 1 March 1997 to convert the Applicant's status to suspension with pay, retroactive to 1 December 1996, the time of the decision to refer the case to the JDC.

XII. The Tribunal is of the view that, in accordance with the Staff Rules, as well as fundamental principles of fairness, an accused staff member should be paid unless there is proof of exceptional circumstances. The discretionary authority of the Respondent to suspend without pay in exceptional circumstances is not absolute and must function within the requirements of due process and the pertinent rules and regulations (Judgement No. 388, *Moser* (1987)).

The Tribunal holds that the Respondent's decision to suspend the Applicant's salary for an extended period of time was unjustified. The qualifying factors surrounding the investigation made it clear that there were no circumstances which could be categorized as exceptional. The Respondent failed to take measures expeditiously to resolve the matter.

The Applicant's continued suspension from duty without pay was unnecessary. As a result, the Applicant was denied his right to due process.

XIII. In conclusion, the Tribunal holds that the Respondent had sufficient justification to conclude that there had been serious misconduct and summarily to dismiss the Applicant. However, the procedural flaws in the process resulted in the Applicant's unjustifiably prolonged suspension of duty without pay, which amounted to a denial of due process.

XIV. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant an amount equal to six months of his net base salary, at the rate in effect on the date of his separation from service, as compensation for the damage done.

XV. All other pleas are rejected, including the request for the production of documents.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Marsha ECHOLS
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/942
24 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 942

Case No. 1019: MERANI

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Ms. Marsha A. Echols;

Whereas, at the request of Neelam S. Merani, the recipient of a retirement benefit paid by the United Nations Joint Staff Pension Fund (hereinafter referred to as UNJSPF or the Fund), the President of the Tribunal, with the agreement of the Respondent, extended until 30 April 1998, the time-limit for the filing of an application with the Tribunal;

Whereas, on 18 March 1998, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 21 April 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "1. To rescind the decision adopted by the Standing Committee of the United Nations Joint Staff Pension Board, at its 180th session, on 2 July 1997 (...), endorsing the refusal of the Secretary of the United Nations Joint Staff Pension Fund to apply to the Applicant's deferred retirement benefit the cost-of-living differential factor provided for in paragraphs 5 and 6 of the Pension Adjustment System.
>
> 2. To order the Fund to recalculate the Applicant's deferred retirement benefit as of 1 January 1996, on the basis of the two-track adjustment system as provided for in

the Pension Adjustment System, including the application of the cost-of-living differential factor.

3. To order the Fund to pay to the Applicant the benefit so recalculated, with retroactive effect to 1 January 1996.

4. To order the Fund to pay to the Applicant interest, at the rate decided by the Tribunal, on the difference between the amounts so recalculated and the sums actually paid, between the date on which each payment became due and the date of the payment of the difference.

5. To order the Fund to pay to the Applicant such amount as the Tribunal may find appropriate for the costs incurred by him in the preparation and the submission of the present application."

Whereas the Respondent filed his answer on 3 December 1998;

Whereas the Applicant filed written observations on 18 February 1999;

Whereas the Respondent submitted written comments on the Applicant's written observations on 12 April 1999;

Whereas the Applicant submitted additional written observations in response to the Respondent's written comments on 19 April 1999;

Whereas, on 3 August 1999, the Tribunal decided to adjourn consideration of the case to its next session and informed the parties of its decision to hold oral proceedings in the case, pursuant to article 17 of the Rules of the Tribunal, and in addition put questions to the parties;

Whereas, on 28 September 1999, the parties submitted their separate responses to the questions put to them by the Tribunal;

Whereas, on 13 October 1999, the Respondent submitted written comments on the Applicant's response of 28 September 1999;

Whereas, on 17 October 1999, the Applicant submitted written comments on the Respondent's submission of 28 September 1999;

Whereas, on 28 October 1999, the Tribunal heard the parties at a public hearing;

Whereas the facts in the case are as follows:

The Applicant, born 31 December 1940, was employed by the International Maritime Organization in1964 and transferred to the United Nations on 8 January 1973. He separated from service with the United Nations on 26 August 1993. As a participant in the Fund, the Applicant requested, on 30 October 1995, that he commence receiving payment of his deferred retirement benefit as from 1 January 1996, i.e., after reaching age 55.

On 8 February 1994, the Chief, UNJSPF Office, Geneva, sent the Applicant an estimate of his UNJSPF pension entitlement, and explained as follows:

> "Following your separation on 23 August 1993, having less than 55 years of age, you became entitled to a deferred pension. In accordance with paragraph 27 of the Pension adjustment system (...) the local currency base amount will be established by applying to the adjusted (CPI adjustment applicable commencing at age 55) dollar amount the average exchange rate over the 36 consecutive months up to and including the month of first payment. Please note that the cost-of-living differential factor does not apply to deferred retirement benefit. For information, the 36-month average exchange rate applicable for deferred periodic pensions commencing now is 1.44 SF per US dollar."

On 11 July 1995, the Applicant gave instructions to the Chief, UNJSPF, Geneva Office, for the payment of his "full deferred retirement benefit (pension), [to be] paid in Swiss francs, at age 55, at the appropriate reduced rate."

On 26 October 1995, the Secretary, UNJSPF, requested the Applicant to contact the Fund one month before the intended date of commencement of his benefits to arrange for payment. He further stated, "Your benefit will be subject to cost-of-living adjustment in accordance with the Pension Adjustment System."

On 26 November 1995, the Applicant wrote to the Secretary, UNJSPF, noting in the third paragraph, in part, as follows:

> "... In your letter you state that my benefit will be subject to cost-of-living adjustment in accordance to the Pension Adjustment System. I understand this as indicating that my initial benefit will be adjusted to reflect the cost-of-living

including any differential between Geneva and New York as the base of the system. I would appreciate urgent confirmation of this ..."

On 8 January 1996, the Applicant furnished proof of his residence in Switzerland.

On 12 February 1996, the Secretary, UNJSPF, informed the Applicant that his first payment was being remitted. On 6 March 1996, the Applicant asked the Secretary, UNJSPF, to provide him with a detailed statement of how the local currency track was calculated in his case. He also referred to the third paragraph of his letter of 26 November 1995 and restated his request for an answer to the question raised in that paragraph. He forwarded a copy of the 6 March 1996 letter on that same day to the Geneva Office of the Fund, and asked what rate of exchange and initial adjustment applied to the Swiss local track on 1 January 1996. On 1 April 1996, the Administrative Officer, UNJSPF, Geneva Office, replied that the Applicant's benefit "was established at your request on the Swiss local track, in accordance with the Pension Adjustment System (...), applied to deferred retirement benefits." Paragraph 27 of the pension adjustment system, reads as follows:

"27. (a) For participants whose date of separation was before 31 December 1989, no adjustment will be applied to deferred retirement benefits prior to the beneficiary's reaching age 50. Commencing at age 50 or the date of separation, if later, the base dollar pension under subparagraph 5 (a) above is adjusted by the United States consumer price index in accordance with section H above without retroactive effect. The two-track adjustment system becomes operative on the date of commencement of the payment of the periodic benefit. At that time a local currency base amount is established by applying to the adjusted dollar amount the average exchange rate over the 36 consecutive months up to and including the month of first payment.

(b) For participants separating from service on or after 31 December 1989, no adjustment will be applied to deferred retirement benefits prior to the beneficiary's reaching age 55. Commencing at age 55 or the date of separation, if later, the adjustment procedures set out in (a) above will be applied to the deferred retirement benefits."

On 9 May 1996, the Secretary, UNJSPF, explained to the Applicant:

"... [T]he amount of your deferred retirement benefit was established by using your US dollar basic benefit of US$ 4,476.09 multiplied by 1.34 which was the 36-month average exchange rate, at the date of the commencement of your benefit, of your country of residence, Switzerland.

The initial local currency track amount of SF 5, 997.96 was payable beginning 1 January 1996 the day after your 55th birthday. Please note that effective 1 April 1996, your pension benefit will be paid at the rate of SF 6,201.90 at the end of each month. This reflects a 3.4% cost-of-living adjustment for Switzerland.

..."

On 12 May 1996, the Applicant wrote to the Secretary, UNJSPF, stating, *inter alia*, as follows:

"...

If the information given to me unofficially that the cost-of-living differential factor was not applied to my entitlement is correct, I submit that this is not in accordance with the pension adjustment system. Under paragraph 4 of the system, 'except as otherwise noted, the pension adjustment system applied to ... deferred retirement ... periodic benefits'. There are several provisions in the pension adjustment system which exclude the deferred retirement benefits from their application. This is the case of special adjustment for small pension[s] provided for in Section E; this adjustment is specifically excluded in the case of deferred retirement benefits under paragraph 10. Similarly, under paragraph 36 (a) and (b), deferred retirement benefits are specifically excluded from the interim and transitional measures specified in paragraph 35. There is, however, no provision in the pension adjustment system which would exclude deferred retirement benefits from the application of the cost-of-living differential factor under paragraph 5 (b).

I am naturally aware of the fact that the cost-of-living differential factor is not mentioned in Section J which deals with deferred retirement benefits. This, however, does not mean that this factor does not apply to these benefits. In view of the unequivocal wording of paragraphs 4 and 5 (b), only an express provision ... could exclude the deferred retirement benefits from the scope of application of the cost-of-living differential factor.

> I am therefore requesting you to review the method by which the local currency amount of my pension was established as of 1 January 1996, by applying to the dollar base amount the cost-of-living differential factor, as applicable in Switzerland on that date, and converting the resulting amount into local currency amount by applying to it the average exchange rate over the preceding 36 months.
>
> ..."

On 7 June 1996, the Applicant again requested the Secretary, UNJSPF, to review the method of calculating his deferred retirement benefit. On 12 December 1996, the Applicant requested an acknowledgement of his prior requests for review. On 10 February 1997, the Secretary, UNJSPF, confirmed to the Applicant that his case would be placed before the Standing Committee of the United Nations Joint Staff Pension Board (UNJSPB) at its June/July 1997 meeting and asked whether the Applicant wished to submit any additional documentation. On 21 April 1997, the Applicant confirmed that he considered the documentation already submitted to be complete.

On 2 July 1997, the Standing Committee of the UNJSPB adopted its decision, which reads, in part, as follows:

> "145. The Standing Committee noted the terms of paragraph 27 of the Pension Adjustment System. While paragraph 4 of the Pension Adjustment System provided generally that 'except as otherwise indicated, the Pension Adjustment System applies to retirement, early retirement, deferred retirement ... benefits,' paragraph 27, entitled 'Deferred retirement benefits', established a specific and *sui generis* calculation system for the determination of the initial local-currency track amount of a deferred retirement benefit, which has been applied by the Fund consistently and without challenge since 1983.
>
> 146. The Washington Formula, of which the COLD [cost-of-living differential] factor is an integral part, was designed to protect income replacement as measured against the last years of salary before retirement; this element was absent with respect to deferred retirement benefits that may become payable only years after separation. Furthermore, to calculate COLD factors with respect to deferred retirement benefits would pose difficult questions as to whether the date of separation or the date of commencement of benefit would be the applicable date, and if the latter, would

permit a beneficiary to choose a commencement date selected with a particularly high COLD factor being applicable, an option that recipients of retirement, early retirement or disability benefits do not have. In addition, all references to the determination of the COLD factors in paragraphs 5 and 6 of the UNJSPF Pension Adjustment System were based on the 36 months *up to and including the month of separation* and to the post adjustment relativities corresponding to those months. In the case of deferred benefits, paragraph 27 of the pension adjustment system clearly calls for using the average of 36 months of exchange rates *up to and including the month of the first payment*. To apply COLD factors based on the separation date for the Applicant would be inconsistent with paragraph 27; moreover, to calculate the COLD factor by reference to the post adjustment relativities up to the date of payment would be inconsistent with paragraphs 5 and 6 of the pension adjustment system. It was noted that, therefore, acceptance of the claim of the Applicant would give rise to serious problems as regards application of the two-track adjustment system.

147. Some speakers stressed that paragraph 4 of the UNJSPF Pension Adjustment System stated explicitly that 'except as otherwise noted,' the pension adjustment system applied equally to retirement, early retirement and deferred retirement benefits. They maintained that, as paragraphs 5 and 6 of the adjustment system dealing with the COLD factor did not explicitly exclude their applicability to deferred retirement benefits, those provisions necessarily applied also to deferred pensions. In their view, the Secretary's interpretation of the provisions of the pension adjustment system in this case was contrary to their text, as approved by the General Assembly. For that reason these speakers were in favour of accepting the claim made by the Applicant.

148. By a vote of ten to four, the Standing Committee upheld the Secretary's application of the Fund's two-track adjustment system with respect to the calculation of the initial local-currency amount for deferred retirement benefits, i.e., that the COLD factor did not apply in the calculation of the initial local-currency amount of deferred retirement benefits. It was noted that this action represented confirmation of a long-established interpretation and practice by the Fund secretariat."

In a letter dated 14 July 1997, the Secretary, UNJSPF, informed the Applicant as follows:

"I refer to your previous correspondence with the Pension Fund secretariat and to your request for a review by the Standing Committee of the United Nations Joint

Staff Pension Board of my decision concerning the non-application of the COLD factor in the calculation of the initial local-currency track amount of your deferred retirement benefit.

At its meeting held on 2 July 1997, the Standing Committee noted the terms of paragraphs 4 and 27 of the UNJSPF Pension Adjustment System, as adopted by the United Nations General Assembly. While paragraph 4 of the Pension Adjustment System provided generally that 'except as otherwise indicated, the Pension Adjustment System applied to retirement, early retirement, deferred retirement ... benefits,' paragraph 27, entitled 'Deferred retirement benefits', established a specific and *sui generis* calculation system for the determination of the initial local-currency track amount of a deferred retirement benefit, a system which has been applied by the Fund consistently and without challenge since 1983.

...

Based on the foregoing considerations, the Standing Committee decided to uphold the Secretary's application of the Fund's two-track adjustment system with respect to the calculation of the initial local-currency amount of your deferred retirement benefit, i.e., that the COLD factor did not apply in the calculation of the initial local-currency amount of your deferred retirement benefit. It was noted that this action by the Standing Committee represented confirmation of a long-established interpretation and practice by the Fund secretariat.

..."

On 21 April 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The initial adjustment based on the COLD factor, set forth in paragraphs 5 and 6 of the pensions adjustment system, should have been applied to the calculation of the Applicant's deferred retirement benefits paid to the Applicant as from 1 January 1996.

2. The Respondent fails to proffer evidence that the General Assembly did not intend the COLD formula to apply to deferred retirement benefits.

Whereas the Respondent's principal contentions are:

1. The COLD factor was never intended to apply to deferred retirement benefits and thus is irrelevant to the calculation of the Applicant's benefits.

2. Paragraph 27 of the pension adjustment system is a *sui generis* system for calculating deferred retirement benefits. Its language excludes the application of the COLD factor under the rule *generalia specialibus non derogant*.

3. It would be administratively impossible to apply the COLD factor (calculated under paragraph 5 as of the date of separation) to deferred benefits, which are calculated on the date of payment under paragraph 27.

4. Applying the COLD factor to recipients of deferred retirement benefits would be inconsistent with the purpose of the formula. It would also result in Fund participants being able to choose a commencement date based on a particularly high COLD factor, thus providing them with an option not available to recipients of UNJSPF retirement, early retirement or disability benefits.

The Tribunal, having deliberated in Geneva on 21 July 1999, and in New York from 2 to 24 November 1999, now pronounces the following judgement:

I. This dispute requires the Tribunal to interpret the provisions of the pension adjustment system and to determine whether they provide parallel adjustments to those who take immediately and those who defer their retirement benefits. Specifically, the Tribunal must decide whether the COLD factor applies to the deferred retirement benefits of professionals. The parties presented opposing interpretations and answers. While the text of the pension adjustment system contains language from which an answer may be implied, it does not directly and unequivocally answer the question.

Consequently, the Tribunal must construe the relevant paragraphs of the pension adjustment system, considering the text of the pension adjustment system as a whole. The Tribunal stated its rule of interpretation in Judgement No. 656, *Kremer and Gourdon* (1994): "An important principle of interpretation is that construction is to be made of the text as a whole, and not of one section alone. That is, the meaning of a section may be affected by other individual sections in the same text. Therefore, [the] ... rule ... should be construed with reference to the context and with reference to other provisions ... In other words, these provisions should be read together and not in isolation in order to obtain their proper construction."

II. The relevant provisions are paragraphs 1 through 6, 17 and 27 of the 1992 edition of the pension adjustment system. Paragraph 1 states what may be called a general principle. "Pension adjustment is intended to ensure that ... a periodic benefit payable by the [Fund] never falls below the 'real' value of its United States dollar amount and to preserve its purchasing power as initially established in the currency of the recipient's country of residence." Paragraph 4 contains another guiding principle, as well as the introductory phrase that gives rise to the conflicting interpretations. *"Except as otherwise* noted, the pension adjustment system applies to ... deferred retirement ..." (emphasis added). The Respondent argues that the rules for deferred benefits are "otherwise noted" in paragraph 27, which is a specialized provision that governs more general provisions under the rule *generalia specialibus non derogant.*

The Tribunal first notes that, like all exceptions, the quoted language should be narrowly construed. Moreover, as explained below, the Tribunal finds that paragraph 27 addresses very limited aspects of deferred benefits, specifically dates for certain calculations, without changing the basic benefits. With regard to those calculations, paragraph 27 prevails over more general or conflicting provisions.

III. Paragraph 27 is contained in Section J of the pension adjustment system and is entitled "Deferred retirement benefit". It contains only subparagraphs (a) and (b). The relevant text is in the last two sentences of subparagraph (a). "The two-track adjustment system becomes operative on the date of commencement of the payment of the periodic benefit. At that time a local currency base amount is established by applying to the adjusted dollar amount the average exchange rate over the 36 consecutive months up to and including the month of first payment." This language requires the Tribunal to define "two-track adjustment system" and "local currency base amount" initially.

The pension adjustment system do not define the two-track adjustment system. The Respondent explained that beginning in January 1979 a unified two-track pension adjustment system went into effect, which now gives to a beneficiary the option of receiving benefits in either United States dollars adjusted by the United States consumer price index (CPI) or in local currency adjusted by the local CPI. The pension adjustment system record keeping follows this scheme and confirms the Respondent's explanation. Under paragraph 3 of the pension adjustment system, the pension adjustment system maintains records of two amounts for a beneficiary: the United States dollar amount that is adjusted periodically and the local currency amount, if applicable, that is also adjusted periodically.

IV. The Tribunal finds that the first quoted sentence from paragraph 27, read in conjunction with the phrase "[e]xcept as otherwise noted" in paragraph 4, establishes a special date for the commencement of this two-track system when benefits are deferred. Instead of beginning this dual record keeping on the date of separation as happens with regular retirees, for deferred beneficiaries this record keeping begins on the date of payment.

Paragraph 17, which is contained in Section H entitled "Subsequent adjustments of the benefit", confirms this interpretation: "As stated in Section A above [paragraphs 1 through 3], each beneficiary's record contains a United States dollar amount and, if applicable, an amount in the currency of his or her country of residence. These amounts, having first been

determined in accordance with Sections C [Determination of base amounts], D [Cost-of-living differential factors] and E [Special adjustment for small pensions] above, are subsequently adjusted on an annual basis ..."

V. The second quoted sentence from paragraph 27 concerns the *establishment* of the local currency base amount, while paragraph 5 (b) concerns the *calculation* of the local currency base amount. Both the Applicant and the Respondent said that, whatever the exception created by this sentence, it does not introduce a new local currency base in concept. According to them the sentence merely establishes a different method for making the conversion from United States dollars to local currency. The Tribunal accepts that both paragraphs refer to the same local currency base amount and that the word "established" is limited to this conversion. As in paragraph IV above, the exception "noted" is a difference in dates. For those who defer benefits the conversion involves a dollar amount multiplied by the average exchange rate for a stated period through the month of first payment, instead of the month of separation.

VI. Consequently, to understand this sentence in paragraph 27 (a) it is necessary to refer to paragraph 5 (b), which concerns the local currency base amount. The latter paragraph defines a process of calculation involving three steps. The first step is to establish a cost-of-living differential for the country of residence and the month of separation. The second is to establish a notional dollar base amount on the basis of the final average remuneration allowable. The third step is to derive the local currency amount by applying an average exchange rate to the notional dollar base amount.

VII. Paragraph 27 (a) incorporates this local currency base amount but also refers to a calculation. The local currency base amount is "established by applying to the adjusted dollar

amount" the currency conversion formula. The words "adjusted dollar amount" are undefined. In interpreting the text we will give words their "natural and ordinary meaning". (Cf. Judgement No. 852, *Balogun*, (1977)). This follows general international practice, which refers to interpretation according to the "ordinary meaning" of the terms "in their context and in the light of [their] object and purpose" unless the parties intended to give the word a special meaning. *(Vienna Convention on the Law of Treaties*, Articles 31.1 & 31.4).

The Respondent argues that the use of the term "adjusted dollar amount", rather than the term "notional dollar base amount" as employed in paragraph 5 (b), is proof that the exception in paragraph 27 excludes the whole paragraph 5 (b) calculation from the deferred benefits system. If we accepted this interpretation, it would exclude the COLD factor from the Applicant's deferred benefit calculations.

VIII. The "dollar amount" in paragraph 27 (a) must be that referred to in paragraphs 1, 2 and 17, all of which refer to the "United States dollar amount". Further, paragraph 3 (a) notes that records are maintained in two "amounts, one of which is in "United States dollars". These are clear references to dollar amount, as opposed to the "dollar base amount" of paragraph 5 (a).

IX. Paragraph 27 (a) speaks of a dollar amount that is "adjusted" before the currency conversion occurs, as mentioned in paragraph 17 (a). To resolve the question of interpretation we must consider first the natural and ordinary meaning of the word. There are several adjustments mentioned in the pension adjustment system, but most are adjustments to the dollar base amount. Paragraph 17, in contrast, mentions adjustments to both the United States dollar amount and an amount of the currency of the beneficiary's country of residence: "These amounts, having first been determined in accordance with Sections C, D and E above, are subsequently adjusted on an annual basis ... (a) The dollar amount is adjusted by the ... United States CPI ..." This is the only pre-payment adjustment used by the Respondent.

Using this base, and giving a special meaning to local currency base amount, the Respondent is thus able to argue that paragraph 27 excludes the application of the COLD factor and denies a benefit to those who defer the payment of their retirement benefits.

X. Another interpretation of paragraph 27 seems more reasonable to the Tribunal. It focuses on the difference in dates (separation versus payment) mentioned previously. The relevant sentence in paragraph 27 (a) starts with the notion of a "local currency base amount", the exact wording of paragraph 5 (b). Thus, this notion carries over to paragraph 27, along with the three-step process described above. However, paragraph 5 (b) was written to apply to retirees whose benefits begin on separation. Consequently, the "notional dollar base amount" is established on the basis of the final average remuneration adjusted by the US CPI on the date of separation. In contrast, when benefits are deferred, the adjustments to the United States dollar amount continue from the date the beneficiary reaches the age of 50 or the date of separation, if later, until the date of payment. The reference point is not the "notional dollar base amount" (adjusted by the United States CPI until the date of separation) but is the "adjusted dollar amount" (adjusted by the United States CPI until the date of payment). This interpretation is supported by language in paragraph 17 which states, "*each* beneficiary's record contains ..., if applicable, an amount in [local] currency ... determined in accordance with Sections C, D [cost-of-living differential factors] and E ..." (emphasis added).

XI. Finally, the Tribunal may also refer to preparatory work and the circumstances surrounding the conclusion of the text. Article 32 of the Vienna Convention on the Law of Treaties provides for recourse to supplementary means of interpretation to confirm the ordinary meaning of the text or to determine the meaning when the usual route leaves the meaning "ambiguous or obscure" or leads to a "manifestly absurd or unreasonable result." While the pension adjustment system is not a treaty, the Tribunal recognizes that the Vienna

Convention is a statement of generally accepted rules for interpreting international documents.

The interpretation chosen by the Tribunal maintains parallel benefits for all retirees who reside outside the United States. There is no clear and unequivocal indication in the record before the Tribunal, including the preparatory work and the circumstances surrounding the 1983 amendments to the pension adjustment system, that the General Assembly intended to change the pension adjustment system to discriminate against those who defer their benefits, had a reason for treating them differently or was clearly presented with the option of doing so. The parenthetical cross-reference in paragraph 4 of Annex IX of General Assembly resolution 37/131 to paragraph 24 (the current paragraph 27 of the pension adjustment system) "Except as otherwise noted (see paras. ... 24 below)" is insufficient to indicate that the General Assembly intended to change a basic feature of the pension adjustment system, especially in the absence of the usual careful and thorough background explanations.

The Tribunal of course can consider practice, when appropriate, as was done in *Balogun*. Similarly, the International Court of Justice considered the practice of the United Nations and of the Specialized Agencies regarding holders of fixed-term contracts in its Advisory Opinion of 23 October 1956 (*Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.).* It is customary in international statutory interpretation to do so. Article 31.1 (b) of the Vienna Convention on the Law of Treaties provides that "[t]here shall be taken into account, together with the context: ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ..." However, the Tribunal finds that the practice of the Respondent in excluding the COLD factor is not representative of the intention of the General Assembly. Practice should be followed only if it is not contrary to an international document. The practice of the Respondent is contrary to what we find to be the meaning and scheme of the pension adjustment system.

In its resolution 35/215, the General Assembly, in discussing the recommendations that took effect on 1 January 1981, noted that the recommended universal pension system was to be supplemented by a "selective system which would provide for the application of cost-of-living differential factors to the final average remuneration for purposes of computing the local currency track pension when a participant retired in a country where the cost of living was substantially higher than at the base of the post adjustment system (currently New York). ... The system of cost-of-living differential factors would be incorporated into the pension adjustment system ..."

The interpretation selected by the Tribunal respects what it believes are the three main objectives of the pension adjustment system. The first objective is protecting pensions against *inflation.* The CPI adjustments to the United States dollar base and to the local currency amount accomplish this objective. The second is taking into account the *cost-of-living differential* for those residing outside the United States. The COLD factor accomplishes this goal. The third is *converting the* United States dollar *pension* amount *into local currency*, when the retiree choose to be paid in local currency. The currency conversion accomplishes this third aim.

XII. The Respondent argues that the conflict in dates is proof that paragraph 27 excludes the COLD factor and that any interpretation other than his reading of paragraph 27 would be impossible to implement because of the conflicting dates. The Tribunal recognizes this conflict in dates but does not find it a ground for denying benefits that the rules provide. In this case the manner of the implementation of the pension adjustment system, given the conflicting dates, is not within the province of this Tribunal, which has power to interpret but not to legislate. The Tribunal in the past has explained the boundaries of its responsibilities with regard to the complexities of the pension adjustment system. (Cf. Judgements No. 546, *Christy et al.* (1991); No. 514, *Maneck* (1991), and No. 589, *Shousa* (1993).

XIII. The final consideration presented, although not expressly addressed, is the posible financial impact of the Tribunal's interpretation on the UNJSPF. This consideration cannot affect the Tribunal's decision regarding the correct interpretation of the pension adjustment system. However, with regard to existing beneficiaries under the deferred benefit system, the Tribunal believes that the statute of limitations has run on similar applications.

XIV. For the foregoing reasons, the Tribunal:

(a) Decides that the COLD factor is applicable to the deferred retirement benefits of the Applicant, retroactive to the date of first payment; and

(b) Rejects all other claims.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Member

Marsha A. ECHOLS
Member

New York, 24 November 1999

Maritza STRUYVENBERG
Executive Secretary

United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/943
24 November 1999

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 943

Case No. 1031: YUNG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Victor Yenyi Olungu; Ms. Marsha A. Echols;

Whereas, on 27 July 1998, Wan-Fai F. Yung, a staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), filed an application containing pleas which read, in part, as follows:

"...

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *To decide* to hold oral proceedings on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules; and

(d) *To order* the Respondent to produce the relevant minutes of the Appointment and Placement Committee's deliberations concerning the posts for which she had been found eligible as well as any other documentation deemed pertinent.

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *To reject* the findings of the Joint Appeals Board that the Applicant's allegations of prejudice had not been proven and that it could therefore not substitute its judgement for that of UNICEF with respect to the Applicant's status;

(b) *To find and rule* that the Respondent's actions in abolishing the Applicant's post of Assistant Project Officer, Research, and threatening her with termination were contrary to prior obligations entered into with the Applicant and violated the requirements of good faith and fair dealing;

(c) *To find and rule* that the decisions of the Respondent to abolish the Applicant's posts on two successive occasions and not to place the Applicant in a permanent post commensurate with her background and abilities were improperly motivated, procedurally flawed and fell short of the requirement of full and fair consideration;

(d) *To rescind* the Respondent's decision to endorse UNICEF's intention to terminate her appointment contingent on her non-selection for a particular P-3 post;

(e) *To find and rule* as a matter of law and equity that the Applicant is entitled to have the issue of her assignment overseas take into account her medical condition and family obligations and dealt with through the appropriate channels;

(f) *To order* that the Applicant be immediately reinstated in the event she is separated from service as a result of the Respondent's decision, or alternatively, if she is still in service, that she be afforded full and fair consideration at the earliest opportunity for placement in a permanent, core P-2 or higher level post;

(g) *To award* the Applicant compensation as an exceptional measure in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(h) *To award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursement."

Whereas the Respondent filed his answer on 14 June 1999;

Whereas the Applicant filed written observations on 3 September 1999, and on 18 October 1999, the Respondent provided his comments thereon;

Whereas, on 27 October 1999, the Respondent submitted additional comments;

Whereas, on 3 November 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 22 December 1975. She was initially offered a three-month fixed-term appointment as a Secretary at the G-3 level in the Administration Division. During the course of her employment she was granted a probationary appointment on 22 March 1976 and a permanent appointment on 1 December 1977. On 1 January 1978, she was promoted to the G-4 level, and on 8 December 1978 she was transferred to the Information Division, with the functional title of Project Support Communications (P.C.) Assistant. She was promoted to the G-5 level on 1 September 1979, and to the P-1 level on 1 January 1981, when she became an Assistant P.C. Officer. On 1 September 1985, the Applicant was promoted to the P-2 level, and on 5 September 1985, she was transferred to the Programme Division and her functional title was changed to Assistant Programme Officer. On 1 January 1994, she was transferred to the Division of Public Affairs (DPA) with the functional title of Assistant Administrative Officer, and on 9 June 1997, to the Division of Communication (DOC), as Assistant Project Officer, Research. The Applicant has been on extended sick leave since 7 April 1998.

In 1996, UNICEF underwent a major restructuring exercise, requiring abolition of a number of posts to achieve overall budget reductions. On 1 November 1996, the Director, DPA, wrote to the Applicant, advising her that "in accordance with the procedures and policies applicable to UNICEF staff encumbering posts to be abolished ... the Budget Planning and Review Committee (BPRC) [had] recommended that the post ... which [she]

encumbered be abolished." Anticipating that the recommendation of the BPRC would be accepted by the UNICEF Executive Board in January 1997, she would be separated on 30 April 1997, unless she had been placed in another position by that time. He assured the Applicant that the decision to abolish her post was based on "various organizational needs and was never a reflection of [her] performance" and encouraged her to apply for posts for which she met the required qualifications. He also informed her that the Recruitment Section of the Division of Human Resources (DHR) would "try its best to identify any suitable vacancies commensurate with [her] qualifications and experience".

Subsequently, the Applicant applied for seven posts. She was short-listed for the L-2 post of Assistant Executive Officer in the Office of the Executive Director, but she was ultimately unsuccessful in her application.

On 25 March 1997, the Applicant requested review of the decision not to select her for the post of Assistant Executive Officer, and that "action be stayed on [her] separation from the Organization until [her] case [had] been subjected to review".

In a memorandum dated 21 January 1997, Ms. Sudershan Narula, Senior Medical Officer, Medical Services Division, United Nations, wrote to Ms. Mieko Tarui, Personnel Officer, DHR, in reference to the Applicant's recent medical examination, on 19 December 1996. She stated that the Applicant suffered from a chronic medical condition, that she had received treatments since 1984, and that, although she could receive comparable treatment in some other duty station, she did not "appear to be psychologically prepared to leave New York". Referring to the fact that the Applicant was also dealing with medical problems within her family, the Senior Medical Officer sought the support of the Personnel Services Section, DHR, in "helping her find another suitable position in New York". She rated the Applicant's medical classification as "1B".

On 21 April 1997, the Deputy Director, DHR, informed several of her colleagues in the Division that the Director, DOC, had agreed that the Applicant be appointed "by Executive Decision" to "a 2-level post in the Division, with mostly administrative (rather than

research) tasks", requiring a revision of the job description. This was the post created in DOC, upon abolition of the Applicant's post in DPA. The Deputy Director, DHR, requested that "[the Applicant's] notice period be extended by one month up to the end of May 1997 to allow for the appointment process to be followed".

On 4 June 1997, the Director, DHR, informed the Applicant that the Executive Director had "approved [her] appointment to the post of Assistant Project Officer, Research, [DOC] ... New York, at [her] current level and maintaining [her] contractual status in this project funded post". The Applicant's appointment took effect on 9 June 1997. Shortly thereafter, the Applicant withdrew her appeal.

On 31 July 1997, the Deputy Director, DHR, wrote to the Applicant, *inter alia*, as follows:

> " ...
>
> As you are aware, given the present restrictive financial situation, all divisions in New York have been requested to realize further cuts in their budget submissions. ... Accordingly, on 30 July 1997, ... [the] Director, DOC, advised you that, further to discussions with your supervisor and his meeting with you on 18 July 1997 regarding the status of your post, the Programme and Budget Review (PRB) Committee had recommended the abolishment of the post you encumber, effective 31 December 1997.
>
> ... we wish to inform you that a special placement review for international professional staff in abolished posts is expected to be convened in the last quarter of 1997. The objective of this exercise is to place as many qualified staff members as possible in posts for which their skills and experience are suitable. Your inability to be posted outside New York for medical reasons will be brought to the attention of the Special Placement Review ..."

On 30 September 1997, the Applicant wrote to the Executive Director, UNICEF, requesting administrative review of the decision to abolish her post.

On 6 October 1997, the Deputy Director, DHR, informed several colleagues in the Division that the Medical Services Division had confirmed that they would clear the

Applicant for a post in Geneva. According to the Medical Services Division, there was no reason why the Applicant should not learn to trust doctors in Geneva.

On 7 October 1997, the Director, DOC, wrote to the Applicant, enclosing a copy of the final version of Chapter 18 of the UNICEF Personnel Manual containing the procedures for the placement of staff encumbering abolished posts. A letter of 6 October 1997, also enclosed, explained that there had been further revisions to Chapter 18 since the version previously sent to Applicant, and as such, the 6 October letter replaced the 30 July letter as formal notice of the abolition of the Applicant's post. The letter also advised the Applicant that "the Programme and Budget Review (PBR) Committee [had] endorsed the recommendation for the abolition of the post [she] encumber[ed] with effect from close of business (...) on 30 April 1998" and that the Executive Director anticipated that the recommendation would be accepted by the UNICEF Executive Board.

On 14 October 1997, in reply to a request for medical clearance, the Medical Services Division informed the Personnel Services Section, DHR, that the Applicant's medical classification was still rated as "1B" and that "medical clearance [was] not required for reassignment to Geneva".

On 4 November 1997, Ms. Karin Sham Poo, Deputy Executive Director, UNICEF, (hereafter the Deputy Executive Director) replied to the Applicant's letter of 30 September 1997, advising her, *inter alia*, that the "the filing of any request for administrative review at this point would be premature as no action has been taken to terminate [her] appointment".

By letter of 18 November 1997, the Director, DHR, informed the Applicant of her "transfer to the post of Assistant Administrative Officer (L-2) ... Geneva", at her "current level and step, maintaining [her] core status", pending approval of the UNICEF Executive Board in January 1998 of the 1998/1999 support budget.

On 30 November 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB) contesting the abolition of her post.

On 5 December 1997, the Applicant wrote to the Executive Director, UNICEF, requesting an administrative review of the above decision, and a stay of action. On 8 January 1998, the Deputy Executive Director, replied to the Applicant's letter of 5 December 1997, on behalf of the Executive Director, UNICEF.

The JAB adopted its report on the Applicant's request for suspension of action on the Respondent's administrative decision on 30 January 1998. It concluded that:

> "16. ... since the Representative of the Secretary-General had confirmed that the decision to transfer Appellant to Geneva required the latter's assent, the question of suspension of action was moot.
>
> 17. As for the decision to terminate Appellant's appointment, the Panel agreed that there would be sufficient grounds to justify a recommendation for suspension of action. However, the Panel agreed it [would] make every effort to complete its consideration of the appeal as expeditiously as possible. ...
>
> ..."

In a letter dated 30 January 1998, the Deputy Executive Director informed the Applicant that the Geneva post of Assistant Administrative Officer (L-2) had been endorsed by the UNICEF Executive Board and requested her to reply to this offer within a week of receipt. The Applicant was advised that if she decided not to accept the offer, it would be rescinded. In that case, however, the Administration would, on an exceptional basis, continue to identify, and put her forward as a candidate for, any suitable posts at her level that would become vacant between that date and 30 April 1998. On the same date, the Director, DOC, sent the Applicant a letter informing her that if she did not accept the Geneva post, and if no other post could be identified for her before 30 April 1998, regrettably UNICEF would have to proceed with her separation of service.

On 5 February 1998, the Under-Secretary-General for Administration and Management informed the Applicant that:

"...

[The Secretary-General] has taken note of the Panel's conclusion that, since your consent to the decision to transfer you to Geneva is required, the question of suspension of action in respect of this issue is moot. He has also taken note that, although the Panel found that there would be sufficient grounds to justify a recommendation for suspension of action regarding the decision to terminate your appointment, it agreed instead that every effort would be made to complete the consideration of the substance of your appeal as expeditiously as possible. The Secretary-General has taken note that the Panel made no recommendation in support of your request and, accordingly, he has decided not to grant your request for suspension of action.

..."

On 6 February 1998, the Applicant replied to the Deputy Executive Director's letter of 30 January 1998, stating that owing to her documented medical condition, she could not accept the transfer to the post in Geneva. In her reply of 12 February 1998, the Deputy Executive Director restated the information provided in her earlier letter of 30 January 1998 and reminded the Applicant that "as an international staff member, [she was] subject to rotation". On 24 February 1998, the Applicant again informed the Deputy Executive Director that she was unable to accept the offer of the Geneva post. On April 7 1998, the Applicant was placed on sick leave for an indefinite period.

On 21 April 1998, the JAB adopted its report on the merits of the case. Its consideration and recommendations read as follows:

"*Consideration*

...

23. Although the Panel was not prepared to accept that Appellant was the victim of some kind of conspiracy, it was equally unwilling to accept that everything possible had been done to ensure that she had received full, as well as fair, consideration. Respondent had argued that in filling all of the posts for which Appellant had been considered proper procedures had been followed, and the

appropriate review body had been consulted. The Panel was aware that, in the absence of a finding of prejudice or improper motivation, it was not called upon to substitute its own judgement for that of UNICEF. ...

24. The Panel was troubled by the fact that the question of Appellant's health - and therefore, her mobility - remained unresolved, and that the Panel itself was incompetent to resolve it. It was also struck by the repeated assertions of both Counsel and Respondent concerning Appellant's qualities as a staff member, qualities confirmed and attested to in her Official Status file. In arriving at its recommendations, the Panel was less moved by compassion for Appellant, though it felt that a staff member with her record and seniority is worthy of it, but more by a sense that UNICEF - and the international civil service - can ill afford to lose staff members of her quality.

Recommendations

25. The Panel unanimously recommends that Appellant's date of termination be delayed until the process of selection of incumbents of the P-3 post and the three L-2 posts mentioned by Respondent (...) has been completed. Should she be chosen for one of them, she would continue to serve on her permanent appointment.

26. The Panel also unanimously recommends that should Appellant be chosen for the afore-mentioned L-2 post in Geneva, a Medical Board should be convened to resolve the question of Appellant's medical status.

27. Given the decision of the Secretary-General with respect to a suspension of action, and the short time remaining between the date of this report and 30 April 1998, the Panel most respectfully requests that the Secretary-General expedite the process of decision in this case.

..."

On 4 May 1998, the Under-Secretary-General for Management informed the Applicant that:

"...

In regard to the merits of your appeal, the Secretary-General has taken note of the Panel's finding that you had not provided proof of prejudice or improper

motivation on the part of UNICEF, and that, in the absence of such proof, the Panel was not called upon to substitute its own judgement for that of UNICEF. The Secretary-General has further noted that, irrespective of this finding, the Panel has recommended (i) that your termination date be delayed pending consideration of your candidacy for specified posts at UNICEF New York and Geneva and (ii) that, should you be chosen for the mentioned L-2 post in Geneva, a Medical Board be convened to resolve the question of your medical status.

The Secretary-General has been advised that UNICEF has agreed to delay your termination date until the completion of the selection process for the P-3 post at UNICEF New York for which you have applied. This is in conformity with one of the recommendations of the Panel. Should you not be selected for this specified P-3 post, the Secretary-General has decided that your termination will be effective as of the date of receipt by you of the notification of your non-selection. As you have already turned down an offered post in Geneva, the Secretary-General finds no reason for your termination date to be affected by selection processes for Geneva posts. In regard to all other posts, UNICEF has agreed that you be treated as an internal candidate for any post for which you are now under consideration or for which you apply within one year after the notification of your non-selection referred to above, should this occur.

In respect of the recommendation regarding medical status, the Secretary-General has decided that this issue has already been addressed by the UN Medical Service and that you have been cleared for reassignment to Geneva.

The Secretary-General is aware that the restructuring at UNICEF and its policy of rotation of staff has placed you in a position where difficult choices have to be made. This situation, however, is not uncommon to UNICEF staff.

..."

On 27 July 1998, the Applicant was advised that, since she had rejected the offer of the post in Geneva and since no alternative post had been found for her, the implementation of her separation would be at the expiration of her sick leave.

On the same date, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment violated the United Nations Staff Regulations and Rules.

2. The Respondent's actions regarding the abolition of the Applicant's posts and her proposed transfer to Geneva violated the principles of non-discrimination and due process, and were tainted by prejudice and improper motivation.

3. The Respondent's treatment of the Applicant with respect to her medical condition demonstrated bad faith. The Respondent's failure to respect basic notions of fairness and to follow the proper procedures for addressing medical questions have caused the Applicant needless anxiety and distress.

Whereas the Respondent's principal contentions are:

1. The Applicant's permanent appointment was properly terminated pursuant to staff regulation 9.1 (a).

2. The Respondent has fulfilled his obligation to make good faith efforts to find an alternate post for the Applicant.

3. The decision to abolish Applicant's posts and give her notice of termination was not discriminatory, nor was it vitiated by prejudice or any other extraneous factors.

4. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 8 to 24 November 1999, now pronounces the following judgement:

I. The Applicant seeks various forms of relief, including reinstatement and compensation, based on actions related to a decision to terminate her employment after 20 years of service and after years as a permanent staff member of UNICEF. Two of the

posts held by the Applicant at the P-2 level were abolished. The first post of Assistant Administrative Officer was abolished during the 1996 restructuring of UNICEF, including DPA. Among the Applicant's claims is that she did not receive full and fair consideration for potential new assignments following the abolition of this first post. The second post was slated for abolition in 1997, only six weeks after it was filled by the Applicant. The Applicant claims that this second action violated the principles of good faith and fair dealing. She also claims that the procedures for the abolition of her posts and for obtaining her separation from service were discriminatory.

II. This matter requires the Tribunal to consider the Applicant's rights after the abolition of her posts, the circumstances surrounding her attempts to find new posts as well as the offer and her refusal of a post in Geneva. In resolving these issues, the Tribunal recalls Judgement No. 679, *Fagan*, para. III, (1994), which states that "staff rule 109.1 (c) requires that such efforts [to find a new post] be conducted in good faith with a view to avoiding, to the greatest extent possible, a situation in which a staff member who has made a career within the Organization for a substantial period of his or her professional life is dismissed and forced to undergo belated and uncertain professional relocation."

III. With regard to the abolition of the first post of Assistant Administrative Officer, the Applicant challenges the events subsequent to that action, rather than the abolition itself. Her complaint is in essence that the Respondent failed to place her in posts for which she was qualified and thereby violated the Staff Regulations and Rules. The Applicant also claims that her original post as Assistant Administrative Officer was used to fund the post of Assistant Research and Evaluation Officer for which she was qualified but not considered.

IV. Chapter 18, paragraph 18.2.20 (a) of the UNICEF Manual concerning "Staff on Abolished Posts" states that when reviewing staff members whose posts are abolished against

available suitable posts, "staff members holding permanent appointments will be retained in preference to those holding fixed term appointments, provided that due regard is given in all cases to relative competence, integrity and length of service". Paragraph 18.2.17 of the UNICEF Manual states that those staff members will automatically be considered for suitable posts, e.g., those in the same occupational group, at the same grade level and for which they are qualified in terms of academic qualifications, job-related skills and work-related experience. Paragraph 18.2.17 (e) (i) states that for international professional staff the post could be located at any duty station.

Staff rule 109.1 (c) (i) also applies. It reads in relevant part "subject to the availability of suitable posts in which their services can be effectively utilized, staff members with permanent appointments shall be retained in preference to those ... on fixed-term or indefinite appointments, provided that due regard shall be had in all cases to relative competence, to integrity and to length of service."

Thus, both the UNICEF Manual and the United Nations Staff Regulations and Rules attempt to protect permanent staff affected by the abolition of a post but allow the Executive Director and the Secretary-General the discretion to take into account relative competence, integrity and length of service.

V. After receiving the notice of the abolition of her first post, in the absence of a placement by UNICEF and faced with termination, the Applicant applied for seven advertised posts but was not selected. The Applicant claims that she did not receive full and fair consideration for the potential new assignments and claims discrimination in this process.

The circumstances surrounding the selection of the person to fill one of these posts raise serious questions of discrimination and favouritism. The post of Assistant Executive Officer in the Office of the Executive Director was advertised as requiring a university degree (e.g., in public affairs or the social sciences). Fluency in English and either French or Spanish was "required". The text of the notice shows the word "desirable" crossed out and replaced in

handwriting by the word "required" with regard to this language proficiency. Professional experience was requisite. The Applicant has a Bachelor of Arts in Communications, speaks Mandarin and Cantonese and has passed language proficiency examinations in English and French. Moreover, at the time of application, she held an L-2 professional post. However, the person selected to fill the vacancy was not similarly qualified on paper. She did not have a university degree and possessed "limited fluency in French". The Selection Advisory Panel substituted her "relevant experience [as Personal Assistant to the Executive Director who was seeking to fill the post] and consistently good performance" for the educational requirement advertised. Additionally, it converted her from the General Service category to the Professional category, in spite of the vacancy announcement requirement that the successful candidate should be a professional. Finally, the Selection Advisory Panel noted merely that it would be "important" for the career growth of the successful candidate "in the future to attain a university degree ... and that she also be encouraged to continue to improve her French language ability." This was done in spite of UNICEF administrative instruction CF/AI/1986-10 of 26 November 1986, that a person acquire the necessary skills for the proficiency required for a post "within a period of three months".

VI. While the Tribunal does not substitute its judgment for the discretion of the Respondent, he must follow his own rules. By failing to select a candidate who either fulfilled the advertised criteria or could do so within three months UNICEF failed to follow its own rules, including staff rule 109.1, and apparently discriminated against the Applicant.

VII. The Applicant also asserts that her first post was not abolished, but was used to fund another post, at the same level, for which she was denied consideration. The record does not clearly support this assertion. While the job titles for the posts are similar and the timing supports the Applicant's claim, there is also evidence in the record to the contrary.

VIII. Having been unsuccessful in the search for a new post and prior to termination, the Applicant asked the JAB to suspend the termination. Discussions between the parties led to a settlement under which, by executive decision, the Applicant was made Assistant Project Officer (Research) subject to revision of the job description to reflect the fact that the Applicant would have few research responsibilities. According to the Applicant, this was the post funded by the abolition of her previous post. Approximately six weeks later, the Applicant was notified that her new post would be abolished. The Applicant claims that this action violated the principles of good faith and fair dealing and constituted discriminatory procedures.

The Tribunal finds on the record no adequate justification for this action by the Respondent. This is the "belated and uncertain professional relocation" criticized in *Fagan*. In addition, the Tribunal notes that after this second abolition of post, staff rule 109.1 (c) and the relevant provisions of the UNICEF Manual applied again.

IX. In November 1997, after the offer of the second post, the notice of its abolition and her second request for administrative review, the Applicant was offered a post as Assistant Administrative Officer (L-2) in Geneva. The Applicant refused to accept the post. According to the Applicant, in January 1997 the Medical Services Division had urged UNICEF to find a suitable position for her in New York. She claims the Respondent knew that, for medical and family reasons, she would not accept the Geneva post. She claims also that the Respondent's treatment of her medical condition underscores two years of bad faith in undertakings with her and that its failure to respect basic notions of fairness and to follow the proper procedures for addressing medical questions resulted in further anxiety and distress.

The record contains medical evidence of the fragile health situation of the Applicant and her immediate family, although it falls short of showing that the Applicant's health

required her to stay in New York. It would appear that the uncertainty surrounding her employment aggravated her medical condition.

The Tribunal has noted that for international professional staff being considered for a post to replace their abolished post, there are no geographical limitations. Paragraph 18.2.21 of the UNICEF Manual states: "In the event that a suitable post is found, the staff member will be offered that post. If [the staff member] does not accept it, ... the organization will not initiate any further placement action. ... [the staff member] will be separated from service on abolition of post ...".

The Tribunal finds that the post offered was not suitable. Consequently, the refusal by the Applicant was not capricious and was justified under the circumstances.

Whether a post is suitable must be decided on a case by case basis in view of all the circumstances presented. In this matter, the employee had been in service in New York for many years. She was not a young professional but was closer to retirement age. Her family was in New York. Of equal importance is that she had finally found medical care that addressed her health problems. Finally, the Applicant had been passed over for at least one apparently suitable post in New York.

For all the reasons stated above, the Tribunal finds that the Respondent failed to act with good faith, failed to abide by the letter and intent of the relevant provisions of the UNICEF Manual and the United Nations Staff Regulations and Rules regarding permanent staff whose positions have been abolished, and that he discriminated against the Applicant.

X. For these violations the Tribunal orders the Respondent:

(1) To place the Applicant in a suitable post; or

(2) To pay the Applicant compensation of one year of her net base salary on the date of this judgement, if within thirty days of the notification of this judgment the Secretary-General decides, in the interest of the United Nations, not to act under (1) above.

XI. The Tribunal rejects all other pleas, including the request for the production of documents.

(Signatures)

Hubert THIERRY
President

Victor YENYI OLUNGU
Member

Marsha A. ECHOLS
Member

New York, 24 November 1999

Maritza STRUYVENBERG
Executive Secretary